

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
HONORABLE WINTON MC KIBBEN, JUDGE PRO TEM PRESIDING
DEPARTMENT X-5

---oo---

MILTON J. HOROWITZ, et al.,
Plaintiffs,
vs.
RAYBESTOS-MANHATTAN, et al.,
Defendants./

No. 965245

REPORTER'S TRANSCRIPT OF PROCEEDINGS AUGUST 16, 1995

JURY TRIAL

15

A P P E A R A N C E S

For the Plaintiffs: WARTNICK, CHABER, HAROWITZ, SMITH &
TIGERMAN

By: MADELYN J. CHABER, Attorney at Law
For the Defendants: PREUSS, WALKER & SHANAGHER
By: CYNTHIA C. ROENISCH, Attorney at Law
SHOOK, HARDY, & BACON By: WILLIAM S. OHLEMAYER, Attorney
at Law

FENTON & KELLER

By: RONALD F. SCHOLL, Attorney at Law
NUTTER, MC CLENNEN & FISH By: STEPHEN J. BRAKE, Attorney
at Law

25

26

27

REPORTED BY: JOANNE M. FARRELL, CSR NO. 4838
JOANNE M. FARRELL, C.S.R. (415) 479-0132

INDEX OF EXAMINATION

	Page
WITNESS - BARRY HORN, M.D.	1038
CONTINUED DIRECT EXAMINATION BY MS. CHABER.....	1038
CROSS-EXAMINATION BY MR. OHLEMAYER.....	1049
CROSS-EXAMINATION BY MR. BRAKE.....	1069
REDIRECT EXAMINATION BY MS. CHABER.....	1081
RECROSS-EXAMINATION BY MR. OHLEMAYER.....	1093
WITNESS - MILTON J. HOROWITZ	
DIRECT EXAMINATION BY MS. CHABER.....	1095
CROSS-EXAMINATION BY MR. OHLEMAYER.....	1158
CROSS-EXAMINATION BY MR. BRAKE.....	1172
REDIRECT EXAMINATION BY MS. CHABER.....	1176
WITNESS - SHIRLEY HOROWITZ	
DIRECT EXAMINATION BY MS. CHABER.....	1177
CROSS-EXAMINATION BY MR. OHLEMAYER.....	1189
CROSS-EXAMINATION BY MR. BRAKE.....	1192
REDIRECT EXAMINATION BY MS. CHABER.....	1193

13

PLAINTIFFS' EXHIBITS

NO.	IDENTIFICATION	IN EVIDENCE
28	1039	
29	1040	1040
30	1114	1115
31	1114	1117
32	1114	1115
33	1114	1117

19 34 1114 1117
20 35 1114 1117
21 36 1114 1117
22 37 - 41 1152 1152

23 DEFENDANTS' EXHIBITS

24 NO. IDENTIFICATION IN EVIDENCE
25 C - F 1058 1094
26 G 1170 1172
27 H 1172 1177

28 ---oo---

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1009

1 P R O C E E D I N G S

2 (In open court outside the presence of the jury.)

3 THE COURT: Good morning.

4 MS. CHABER: Your Honor, let me get the Court some
5 depositions.

6 THE COURT: Let me start by returning these copies of
7 medical records that you gave me last night, Ms. Chaber.
8 I've looked at them, and it seems to me they are all of a
9 personal nature and will not lead to admissible evidence.

I
10 I don't believe they will be enlightening in any way to the
11 defense.

12 MR. BRAKE: Thank you, Your Honor.

13 THE COURT: It might satisfy curiosity, but that's
14 all.

15 MS. CHABER: And the Court then would sustain
16 plaintiffs' objection to producing these to the
defendants?

17 THE COURT: Yes; correct.

18 MS. CHABER: Thank you, Your Honor.

19 Your Honor, there are some designations I'd like to
20 give you, and we can start out with the Comproni
deposition.

21 May I hand them up to you?

22 THE COURT: Sure. We will mark them later.

23 MS. CHABER: They have actually been filed.

24 THE COURT: All right.

25 MR. BRAKE: And we have, predictably,
26 counter-designations and objections to some of them. What

I
27 I did, Your Honor -- whichever is Your Honor's preference --

I
28 I took the transcript and marked just the portions I was

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1010

1 objecting to, but maybe if Ms. Chaber marked the whole
2 thing, we can go into the objections and work off her set.

3 MS. CHABER: There's two volumes, Your Honor. I'll
4 give you the second volume. But before we get to that
5 matter, Your Honor, there were a couple of -- and I guess
we
6 could do it afterwards -- but there were a couple things I
7 wanted to raise before Dr. Horn came back and before my

8 client's testimony, which will follow Dr. Horn's.
9 One is that during the -- let's see how to phrase
10 this. My client lives in [DELETED], lives in a section
of
11 [DELETED]. I believe, and if I'm
12 incorrect about this, then it's not an issue, that counsel
13 intends to cross-examine Dr. Horn, as well as Dr.

Horowitz,
14 with sort of an implication that there's something wrong
or
15 improper about filing this case up here in San Francisco
16 rather than in [DELETED].

17 There was never any motion to change venue made and
18 the case is properly filed here. There's never been any
19 motion contending that it wasn't. And I think that it
would
20 be improper to allow the impermissible inference to be
drawn
21 that somehow this is somewhat suspect.

22 The questioning that took place at Dr. Horn's
23 deposition -- and again, if this isn't going to be, then
24 it's not necessary to raise it -- went along the lines of
25 you: Don't regularly see patients from [DELETED], do
26 you? And: Doctors from [DELETED] don't regularly
refer
27 you patients, and implications in Dr. Horowitz's, my
28 client's, deposition that, you know, all the witnesses
were

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1011
1 down in [DELETED]
2 I just think that it would be improper to be raising
3 that as something. It's not relevant to the issues that we
4 are here on. We are either in the proper court or we are
5 not. The issue of being in the proper court was never
6 raised, and I would ask the Court for a caution to
7 defendants not to engage in that type of questioning of the
8 witnesses.

9 THE COURT: Any response from the defendants?

10 MR. OHLEMEYER: Well, Your Honor, I'm not trying to
be
11 facetious, I'm not quite sure what Counsel's asking for.
12 The fact that Dr. Horowitz lives in [DELETED] and the
13 fact that Dr. Horn practices in Oakland, and the genesis
of
14 the lawsuit, how Dr. Horowitz went from [DELETED] to
15 Oakland to see Dr. Horn, and all that, is a fact that is
16 relevant to some of the issues in this lawsuit.

17 I don't intend to suggest to Dr. Horowitz that he
18 should have filed his lawsuit in [DELETED], but by the
19 same token, I don't think I should be precluded from
20 eliciting facts from the Doctor, or Dr. Horn, as to the
21 respective geography and how they all got together.

22 The fact is, Dr. Horn is not one of his treating
23 physicians. Dr. Horn was hired by Ms. Chaber's firm to
24 interview and review Dr. Horowitz's medical records, and
the
25 fact that Dr. Horn doesn't typically do that, either by
26 referrals from doctors in Los Angeles or by practice is
part
27 of the information this jury should be allowed to hear in
28 determining whether Dr. Horn is credible, Dr. Horowitz is

1012

1 credible, and whether the lawsuit -- the genesis and
2 progression of the lawsuit is all relevant to the
3 credibility and other issues the jury has to decide.

4 THE COURT: Can't you just simply ask him -- I assume
5 that he was hired as an expert by the firm. What's wrong
6 with that? You can ask that question, but I don't know
that

7 an undue emphasis should be placed on the relative
8 geographical positions of where they are. It doesn't have
9 any significance.

10 MR. OHLEMAYER: Your Honor, I maintain that it does,
11 and I think at the end of the case, you'll see why. But
are
12 you telling me I can't ask --

13 THE COURT: I didn't say that. I said I think that
it
14 should not be emphasized. And I think you can ask an
15 appropriate question, but it shouldn't be dwelled upon.
It

16 happens all the time, that law firms refer clients to
17 experts for an evaluation, doesn't it?

18 MR. OHLEMAYER: Sure it does.

19 THE COURT: There's nothing wrong with that. A
20 typical question is: Who hired you?

21 MS. CHABER: And I'm not contending that he can't do
22 that, Your Honor.

23 THE COURT: I understand.

24 MS. CHABER: I brought that out on direct
examination.

25 That's not the import of what I'm saying.

26 THE COURT: I can't foresee all the questions and
27 answers that are going to be forthcoming. Just don't
unduly

28 dwell upon the geographical position of the parties,
unless

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1013

1 it has some real significance.

2 If its purpose -- or, it seems to me, that it could
be

3 prejudicial if it's dwelled upon, and I don't know what the
4 implication will be from the jury, but you know, people are
5 sophisticated, and sometimes they have -- there are
6 speculations that arise as a result of something that has
no

7 real foundation. I don't know why he did it and it doesn't
8 matter to us, really, why he filed here, whether it's a
9 friendship in somebody in the law firm or something else,
or

10 a friend up here who said: You've got to get this law
firm.

11 You've got to get this doctor. That happens.

12 But why dwell on it? The issue is: Has the
plaintiff

13 suffered as a result of some conduct of the defendants?

14 That's the issue.

15 MS. CHABER: That raises --

16 MR. OHLEMAYER: And in deciding that issue, Your
17 Honor, the rules of evidence give me wide latitude in

18 bringing any matter that has an effect --
19 THE COURT: I agree with that, and I intend to allow
20 it. But I'm just saying don't dwell on it, that's all.
21 MR. OHLEMAYER: I understand.

22 MS. CHABER: Your Honor, that raises, and is
certainly
23 implied in what Mr. Ohlemeyer is indicating he intends to
24 do, that raises another issue.

25 Dr. Horowitz responded to a class action notice, not
26 placed by my firm, Your Honor, not placed by any law firm,
27 but a class action notice that was ordered by the Court in
28 Texas that was overseeing the Ahearn, A-h-e-a-r-n, class

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1014

1 action, which is the largest class action of its kind of an
2 asbestos case with Fibreboard and its insurers and the
3 plaintiffs filing the class action together.

4 We are one of the four class counsel nationwide.

It's

5 our office, Steve Case's office over in Oakland, a Ron
6 Motley's office out of South Carolina, and the fourth firm
7 is somewhere else -- I'm spacing now -- the fourth firm is
8 someplace on the East Coast.

9 There was a huge advertising campaign. In fact, the
10 Court ordered that they spend, it was several million
11 dollars advertising, because it is or was potentially a
12 future class, and they deemed that notice was required to
13 all potential members of the future class.

14 And as such, they put in the newspaper anyone who
has
15 any of the following diseases, of which mesothelioma was
16 right at the top. And also, you know, who worked in the
17 following industries, and listed all sorts of different
18 industries or different jobs, and Dr. Horowitz and his
wife
19 saw this, and that is how they came to contact my law
firm.

20 I don't think that there is anything probative about
21 the issue that that is how they got to my law firm. It
22 doesn't decide any issues in this case and yet, I expect
23 that Mr. Ohlemeyer, particularly given what he just said,
24 has every intention of trying to make that an issue in
this
25 case as though that were somehow improper for someone to
do
26 that, or as though my law firm advertised for people,
which
27 we did not, have never done. We do not advertise for
28 clients. We do not go seeking clients.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1015

1 But as a result of the Ahearn class action, we had to
2 put on 15 people to answer telephones just to respond to
3 information and send out claim forms to people, and so
4 forth.

5 Dr. Horowitz happened to be one of those calls, and
he
6 asked to speak to a lawyer after getting the information
7 about the class action, because he was presently suffering
8 from mesothelioma, and his doctors had told him it was
9 asbestos-related.

10 I'm very concerned that this is going to be
something
11 that is going to be raised. It has prejudicial effect.
It
12 looks like I've been advertising for clients and that I
went
13 seeking them in Los Angeles, and I think it's an improper
14 inference. And I don't think it advances the ball, in
terms
15 of any of the issues that need to be proved in this case,
16 and I would ask the Court to caution defendants not to do
17 that in their questioning and not to raise those issues.
18 On the same token, I have a major concern because
19 Dr. Horowitz's deposition was videotaped for preservation
of
20 testimony. We always videotape our mesothelioma and lung
21 cancer clients because, unfortunately, we have lost many
of
22 them, and before their trial dates or they are so ill,
that
23 they are unable to come into court, and we use the
videotape
24 in lieu of their trial testimony. So he had a videotape
25 deposition that was for preservation of trial testimony.
26 During the course of that deposition, Your Honor, I
27 had to object on attorney-client privilege more times than
I
28 think I've ever used that phrase in my life. The
questions

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1016

1 that were asked by Mr. Ohlemeyer were: And what
discussions
2 did you have with anyone, including your lawyers, about
Kent
3 cigarettes containing asbestos?

4 And that type of questioning went on forever, with an
5 implication that somehow the lawyers have manufactured this
6 lawsuit. I think that there is no foundation for that, I
7 think it's an improper inference, I think it's highly
8 prejudicial for me to have to stand up here in court and
9 object on attorney-client privilege grounds as though I'm
10 trying to hide something, and I would ask the Court to
11 caution defendants about that same issue, as well.

12 I can cite the questioning, and it was not just
13 Mr. Ohlemeyer at the deposition, it was Mr. Brake, as
well,
14 and he followed up on precisely the same questions and
asked

15 the same improper questions at the time of the deposition.

16 And that's my concern, Your Honor. I think there's
17 going to be an attempt through Dr. Horn and through my
18 client to cast aspersions on myself and my law firm, and I
19 think it's highly improper, and I would ask this court to
20 not allow that to occur.

21 MR. BRAKE: If I could be heard, because there's two
22 sides to every story, and there's a problem with the way
23 plaintiffs' counsel has characterized what she says we are
24 going to do.

25 There's an issue in the case that goes to the
26 credibility of the plaintiff when he says he smoked Kent
27 cigarettes. It has to do with how the case came about.

The
28 case was filed in November of 1994. November of last
year.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1017

1 After Dr. Horowitz saw this class notice in the newspaper,
2 he called plaintiffs' counsel's firm. They then filed a
3 lawsuit in November naming the garden variety universe of
--

4 what I understand to be the garden variety universe of
5 asbestos manufacturers and suppliers.

6 In January, they sent the plaintiff up to meet with
7 Dr. Horn.

8 MS. CHABER: December.

9 MR. BRAKE: December, I'm sorry. His report is dated
10 January.

11 At that time, Dr. Horn interviews the plaintiff and
he
12 finds out, of course, that the only exposure he could
really

13 come up with is this hospital in Cleveland and 13 days on
a
14 troop ship, and maybe a house in Beverly Hills. In other
15 words, he doesn't have an occupational exposure case.

16 And then, for the first time, as Dr. Horn testified,
17 he brings up Kent cigarettes. Dr. Horn asks him what
brands

18 he smoked. Dr. Horn said: I only asked him what brands.
19 He says: I smoked Kents in the '50s. Oh, boom, well then
20 let's amend the lawsuit and bring us in, in addition, and
I
21 think we were brought in in February or March. Later in
the
22 year.

23 Now, our only point is, and I think all we were
24 getting at is we would like to know how come we were
25 belatedly discovered as a supposed source of this man's
26 exposure, and what the facts were surrounding that.
That's

27 what those questions went to in the deposition.

28 What did Dr. Horn tell you? Well, he told us about
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1018

1 that, but the credibility of who was there and what were
2 people told, we are getting at. I think that is very much
3 in issue. I, for one, haven't frankly thought through what
4 I would ask about that, if anything. And I certainly did
5 not intend to come in and say: Isn't it true your lawyer
6 told you to say Kent cigarettes, or anything of that sort.

7 That was a discovery deposition and what we wanted to
8 know was: Who told you about Kent cigarettes and the
9 asbestos, and how come basically you got a lawyer, you
10 organized a case, you sued everyone in the world except
us,

11 and then three months later you amend us in? It looked
12 funny, and we wanted to know why it looked funny. And now
13 counsel wants a blanket order. I, for one, am not going
14 to --

15 THE COURT: I don't think she was asking for a
blanket

16 order, per se, and I don't intend -- I don't do blanket

17 orders of that nature.
18 All I can say with respect to that is sure, from
what
19 you've said, there's a basis to make an inquiry, but
there's
20 a way to do it. You don't do it in the fashion that she
21 outlined, and whether you did that at deposition or not is
22 beside the point. This isn't a deposition, this is before
23 the jury, so you don't ask questions that are going to
give
24 rise to undue prejudice.
25 There may be prejudice by the nature of certain
26 things, of course. I mean, from what you said, people
would
27 wonder, naturally, and so he's entitled -- you're entitled
28 to ask the question and he's entitled to explain. And if
he

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1019
1 gives a different answer or an unrealistic answer, you can
2 probe, but you can't -- you're not supposed to do something
3 that causes undue prejudice. That's all I can say.
4 MR. BRAKE: Exactly. In fairness to me, because
5 counsel keeps suggesting that I've done this improper, I
6 don't think I've asked a question yet that suggests an
7 improper answer, and I wasn't going to ask: Didn't
8 Ms. Chaber put ads in the paper for lawyers, for cases?
9 THE COURT: She's explained it all and you have added
10 to the explanation, and assuming it was all of those
things
11 to have a basis in fact, all I can say again is don't do
12 something that's going to cause undue prejudice, because
if
13 you do, then one, I have to admonish the jury; secondly,
it
14 gives rise to some basis for a mistrial, perhaps. We
don't
15 want to do that. We want to get the trial over with and
get
16 a decision and do something more interesting or equally
17 interesting, or whatever.

18 MR. OHLEMAYER: Amen.
19 THE COURT: Depending on your point of view.
20 MR. BRAKE: Thank you, Your Honor.
21 MS. CHABER: Your Honor, I am really concerned about
22 this because --
23 THE COURT: I understand, and I'm not going to give
24 any more specific instructions. I've cautioned them.
25 You've raised the issue, and they are on notice.
26 MS. CHABER: Let me read you the questions that were
27 asked, Your Honor. This was a preservation of testimony.
28 If I was putting my client on, these would be before you.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1020
1 And I'm asking for a preruling on them so that these
2 defendants do not do that.
3 THE COURT: Well, I've told them, and if they do it,
4 why, then that's the risk.
5 MS. CHABER: First of all, complaints are filed
6 unverified. My client did not verify --
7 THE COURT: Okay. I think that it's appropriate, if

8 it was added sometime later, to find out why it occurred.
9 MS. CHABER: That's fine. I don't have a problem
with
10 the timing. Dr. Horn told him it contained asbestos. We
11 got Dr. Horn's -- the information from Dr. Horn and we
filed
12 an amended complaint.

13 THE COURT: Fine.

14 MS. CHABER: But to ask my client the reasons he
15 understands the lawyers didn't do it initially and did it
16 later --

17 THE COURT: That's not the question he's to ask.

The
18 questions that he's to ask is to find out when he found
out
19 about Kents cigarettes, when he told somebody, or whatever
20 it is. They can ask him that. When did you determine
that
21 Kent cigarettes were a contributing factor to your
illness?

22 MS. CHABER: And he's going to say: When I met with
23 Dr. Horn.

24 THE COURT: That's fine. And that may end it. I
25 don't know. And they know more than I know about it, as
you
26 do. And I can't imagine what the questions will be, and
I'm
27 not going to speculate about them, but I have cautioned
28 them.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1021

1 MR. BRAKE: Your Honor, the more Ms. Chaber gets up
2 and essentially accuses me of various malfeasance, the more
3 annoying it gets. Let me just cut through it. She's
afraid

4 I'm going to say to her client: Isn't it true that your
5 lawyer told you that you needed to bring Kent in and say
you
6 smoked those cigarettes?

7 I am not going to ask that question. I don't -- it's
8 as simple as that. I don't know what other improper
9 questions she thinks I'm going to ask, but I'm not going to
10 ask that.

11 MS. CHABER: These are the improper questions, Your
12 Honor. Did you, prior to the lawsuit being filed -- I
take

13 it you met with your lawyers and relayed to them
information
14 about what you felt were the circumstances under which you
15 were exposed to asbestos.

16 Did you specifically, very specifically, did you
tell
17 your lawyers, prior to the filing of the original
Complaint

18 on November '94 that you smoked Kent cigarettes? That's
19 totally improper. That's attorney-client privilege, and
20 that's what they were seeking to go into at that point and
21 that's what they intend to do.

22 MR. BRAKE: She had already introduced a waiver
issue
23 into that deposition. And what I wanted to know was when
24 the man knew about Kents. It's a perfectly fair question,

25 because if he had reason to know before -- this isn't a
big
26 secret. Kent cigarettes have asbestos in them. He filed
a
27 lawsuit in November, he didn't join us until January.
28

MS. CHABER: He saw Dr. Horn on December 9th. We
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1022
1 joined you in December.
2 MR. BRAKE: I inquired in deposition, and there was a
3 very real waiver issue.
4 MS. CHABER: There was no waiver of my
attorney-client
5 privilege.
6 MR. BRAKE: The point is, I have already said we are
7 not going to ask him did your lawyer --
8 MS. CHABER: I can't waive it, anyway. My client
9 hasn't waived it.
10 MR. BRAKE: You're you're clients' --
11 THE COURT: Don't all talk at once. Nobody gets
anything.
12 MS. CHABER: Only a client can waive attorney-client
privilege.
13 THE COURT: That's correct. All I can say is don't
ask improper questions.
14 MR. BRAKE: I have no intention -- I have not asked
one yet in the trial, and I have no intention of asking an
improper question.
15 THE COURT: All right.
16 MR. BRAKE: Thank you, Your Honor.
17 MS. CHABER: I wanted the Court to be apprised of
that.
18 MR. BRAKE: The simple purpose being to try to
affect
19 my credibility, which is totally unfair. There's a
perfectly legitimate line of inquiry at the time.
20 MS. CHABER: The simple purpose is so I don't have
to
21 stand up here and object on attorney-client privilege,
which
22 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1023
1 looks like we are trying to hide something.
2 THE COURT: I understand.
3 MS. CHABER: That's an improper inference.
4 Comproni, I guess, would be the deposition.
5 THE COURT: All right.
6 MS. CHABER: I have just received the defendants', so
7 I haven't had a chance to look at theirs or compare it, but
8 we can do it as we go along.
9 MR. BRAKE: I don't mind waiting, either, because I
10 did it on 24 hours notice. If you'd like to do them
11 tomorrow, that's fine with me.
12 MS. CHABER: No, I'd like to do them now.
13 MR. BRAKE: My first objection, Your Honor, is in
14 Mr. Comproni's volume 1, April 16, if Your Honor has that.
15 THE COURT: What page?
16 MR. BRAKE: The first one is on page 4 at the
outset.
17 My objection actually is to lines 7 to 12.
18 THE COURT: Wait until I find it. I've got two

volume

19 two's here.

20 MS. CHABER: I'm sorry.

21 THE COURT: What, starting at line what, Mr. Brake?

22 MR. BRAKE: Line 7 to 12, Your Honor, which is the
23 introductory colloquy from the lawyer, which is not
24 evidence, not relevant.

25 THE COURT: Well, that, I assume --

26 MR. BRAKE: The problem is he goes on -- I think we
27 can dispense with that.

28 THE COURT: Page 4 from lines 4 through 15 or

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1024

1 something, which is all about somebody else's law firm, you
2 don't want that in, do you?

3 MS. CHABER: No.

4 MR. BRAKE: So we will begin on line 13, which is the
5 first question?

6 MS. CHABER: Yes.

7 MR. BRAKE: Thank you. Then I don't have any
8 objections until we get up to page 8, Your Honor, beginning
9 at line 14, goes through to page 9, line 3.

10 My objection here, Your Honor, is he's been given --
11 it's a relevance objection. He's given certain reports

and
12 asked to read from those reports the dates he visited the
13 factory. He's reading off the report, and I have a
14 relevancy problem with it. I understand it's sort of
15 foundational to a lot of the testimony, but I'm not sure
16 it's really necessary.

17 MS. CHABER: I think he's entitled to refresh his
18 recollection as to the dates of something that he did 40
19 years ago, Your Honor, and I think that's really all that
20 that was an effort to do.

21 MR. BRAKE: See, this is what I'm saying. You can
22 refresh a witness' recollection after he testifies to a
23 lapse of memory. This man didn't have any actual memory,
24 and so he was given documents. When did you go there?

Oh,

25 I went April the 15th, blah, blah, blah. So there's no
26 testimony here as to a lapse of memory. It's simply him
27 reciting off the document. That's really the nature of my
28 objection to this.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1025

1 MS. CHABER: The point is merely to get the dates.

If

2 you don't want the reports mentioned--

3 MR. BRAKE: I don't know it's so much that. There's
4 later testimony about his five visits. This is really not
5 that relevant. He reads off the reports the five days. He
6 reads -- and I don't have an objection to he went there a
7 series of times. You can't really use that transcript
8 without that testimony. I don't think it's really fair to
9 do this. I'll drop it.

10 MS. CHABER: How about if we do it this way.

11 MR. BRAKE: That's okay.

12 MS. CHABER: The answer on page -- on lines 12
through

13 13, I made several visits to their plant in West Groton,
14 Massachusetts, skip down to line 21, well, the first visit

15 was on October 27th, 1952. Then there's no inference that
16 he's reading off of reports, he's just giving the dates.

17 MR. BRAKE: Is that would be fine.

18 THE COURT: All right.

19 MR. BRAKE: The man went there. I don't have a
20 problem with that.

21 I have listed an objection on page 13. Well, I
don't

22 think Ms. Chaber really needs it. This is sort of
sticking

23 out by itself. Again, all it shows is he's reading off
the
24 report. In the interest of moving it along, I'll drop
that
25 one. It's no big deal.

26 On page 14, Your Honor, line 5 to 11, designation
goes
27 on -- I don't have a problem with lines 12 to 18, but line
5
28 to 11 is classic hearsay. The witness has no memory of
who

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1026

1 he talked to. He's simply reading it off the report, and I
2 object to lines 5 through 11.

3 MS. CHABER: If he has no memory, he's refreshed his
4 memory with the report.

5 MR. BRAKE: You had him just read the report, which
is
6 inadmissible. He didn't testify to a lapse of memory, he
7 just reads it off the report.

8 THE COURT: Okay. Sustained.

9 MR. BRAKE: So we will read beginning at line 12.

10 The next objection is beginning on page 16, line 21,
11 carries over to 17, line 5, and I have a relevance
12 objection. He's talking about what he was told about the
13 percentage of asbestos in the processes, and he's speaking
14 of the manufacturing plant that this man visited.

15 My objection is that it's really a relevance one.

The

16 30 percent number is not a big deal to me, but it's
mislead

17 in the context of this case about this product, because
18 Dr. Longo will testify -- there's other evidence,
including

19 the patents which counsel will probably offer in evidence,
20 and Dr. Longo's testimony -- this, I think, is not
relevant,
21 and it's essentially confusing.

22 The 30 percent number relates to the industrial
process, I think not the actual filter. The filter, I
23 think, even Dr. Longo will agree, is not 30 percent
24 asbestos, and that's misleading, and I would suggest not
25 relevant.
26

27 MS. CHABER: Your Honor, that was the information
that
28 he was provided at the plant, and that was the basis of
his

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1027

1 opinions on dust levels and hazards. And the source of

that

2 information is the plant manager. So if it's incorrect
3 information, it's information supplied by Hollingsworth and
4 Vose.

5 MR. BRAKE: It's correct as to the dust process --
6 it's correct as to what, one assumes 30, 40 years later,
7 because he reads this off a report, he records that he's
8 told the process is 30 percent asbestos, but what's in the
9 process seems to be, all I'm saying, is different than
10 what's incontrovertible as to what was in the cigarette.

11 In other words, asbestos -- it's not 30 percent in
the
12 end product. To be honest, it's not a huge deal to me.

The
13 only thing, if counsel really wants it, I'll drop the
14 objection, but here's my concern. I don't want it to be a
15 Trojan horse to get us into the industrial plant and what
16 was going on at the plant.

17 She's designated a little bit, this whole -- she's
18 designated just a little bit about that, so I'd like it
19 understood I have a very strong relevance objection to it.
20 The 30 percent number by itself is really irrelevant.

21 THE COURT: I'll let it in, then.

22 MR. BRAKE: This brings me up, I believe, to --
23 carries me up to page 24, line 5 to line 23. And I'll
note,

24 Your Honor, the designation that counsel has begins on 23.
25 And in that, she's going to read part where this man
26 purports to tell Hollingsworth and Vose about the hazards
of
27 asbestos.

28 And I had a motion in limine on this, and my memory
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1028

1 was, Your Honor, your ruling was she could testify, have
him
2 testify, read the parts that related to him telling
3 Hollingsworth and Vose about knowledge of asbestos, but
that

4 we wouldn't get into the plant, so I want the record to be
5 clear I made that objection in the motion in limine.

6 I'm not going to renew that today, but where I do
have

7 a problem, as I said, it's 24, line 5, with a series of
8 questions beginning: Did this seem to be any surprise to
9 them, and the particular objection to this is, if you look
10 at the question on line 15: What leads you to say that,
11 sir, why you felt they weren't surprised?

12 Because he goes on to say that they had been dealing
13 with asbestos and they were told by our inspector
certainly

14 before we arrived, and they seem, therefore, to be
cognizant

15 of the fact there's asbestos material. He's talking about
16 something of which he cannot have personal knowledge.

He's
17 speaking about what someone else, this inspector named
Hahn

18 that was with him told him.

19 It's very nature, from line 5 on page 24, to the end
20 of that page, is testimony, as he's testified to, he has
no

21 foundation to give that statement as to what they knew
when
22 he showed up.

23 MS. CHABER: Well, he certainly can testify to what
24 they were cognizant when he showed up. He says they were
25 cognizant of the fact they had a hazardous material. They
26 have conversations with them.

27 MR. BRAKE: It's based on the fact he was told by
the
28 inspector, certainly before we arrived.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1029

1 MS. CHABER: And, it says: And upon our arrival,
they
2 were cognizant of the fact that they had hazardous
material.

3 If you want the conversation by the inspector before out,
4 that's fine. But the "and upon our arrival," he was there.
5 They were cognizant of the fact they had a hazardous
6 material.

7 MR. BRAKE: On page 25 and 26 he gives his real
8 testimony on the subject, which he says that he discussed
9 with them the hazards with regard to his sampling. I
10 haven't objected to that. He explained, on page 26, line
13
11 to 17: What's your best recollection of the gist of those
12 discussions? The answer, on line 50: To merely explain
to
13 them that we were here to evaluate their potentially
14 hazardous work conditions. Our test results will
determine

15 whether further controls were necessary in the plant.

16 MS. CHABER: I think if you turn over to page 26,

Your Honor, you'll see --

18 MR. BRAKE: That's where I'm reading.

19 MS. CHABER: -- you'll see, on the bottom of page

25,
20 he says, I think over onto 26: What I was about to ask
you
21 when I was interrupted is what leads you to believe that
22 they were cognizant of the hazards of asbestos when you
23 visited them in the 1950s? Answer: We discussed that at
24 the time we were doing our sampling.

25 MR. BRAKE: Absolutely, and I don't object to this,
26 and I don't object to we discussed it with them, the plant
27 manager. And what's your best recollection? And he says
28 what his recollection is. And he's very clear as to what
he

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1030

1 says he discussed with them, potentially hazardous working
2 condition of the test result. Fair enough. That's what he
3 told them.

4 But the earlier page where he goes on, did they seem
5 to be spliced, they were knowledgeable, how did you know
6 they were knowledgeable, what leads you to say that,
7 circumstance, they had been dealing with asbestos
8 previously, so it's drawing an inference there.

9 And they were told by inspectors, certainly before we
10 arrived. He's speculating about something that happened

11 before he could have personal knowledge of it. The only
12 portion of this whole discussion --
13 THE COURT: This is 24, line 5?
14 MR. BRAKE: Through line 23, which I think are the
15 questions tainted by his lack of personal knowledge.
16 THE COURT: All right. Page 24, line 5 through 23
17 will go out.
18 MR. BRAKE: And I don't object then, Your Honor,
until
19 page 51. Designation begins on line 17, continue over
until
20 53, line 1, is the portion I object to.
21 MS. CHABER: Your Honor, could we just go back a
22 second, because I want to just see something. I just
wanted
23 to see -- Your Honor, I would ask to be able to leave in
24 from lines 5 through 9 on page 24. And then it follows
over
25 to the next question that's asked on page 25, beginning at
26 line 24.
27 Did this seem to be any surprise to them? No, I
don't
28 believe they were surprised at all. They were
knowledgeable

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1031
1 about the effects of asbestos. What I was about to ask --
2 and we will leave out when I was interrupted part is: What
3 leads you to believe that they were cognizant of the
hazards
4 of asbestos when you visited them in the 1950s?
5 Answer: We discussed that at the time we were doing
6 the sampling. That leaves out any of what counsel has
7 raised as the improper basis for it, but yet, makes sense
to
8 the next question because otherwise, you have a question
out
9 there without the predicate.
10 MR. BRAKE: See, lines 5 through 9 on page 24 are
11 tainted by the next question. The objectionable one is
the
12 following. Question, line 5 through 9: Did this seem to
be
13 a surprise? No, I don't think so. What leads you to say
14 that, sir? Well, our inspector certainly had told them
15 before we arrived.
16 I think 5 through 9 is tainted by the subsequent
one,
17 and I would simply point out that to go to page 26 where
the
18 correct answer is, you could simply begin on line 2 with
the
19 actual question. What leads you to believe that they were
20 cognizant of the hazards of asbestos when you visited them
21 in the 1950s? And the answer is based on when he was
there
22 and did his sampling, he told them about the potentially
23 hazardous working condition.
24 MS. CHABER: But the point is that that set of
25 questions was to cure what defendants objected to at the
26 time at the deposition.
27 MR. BRAKE: Then read the curative portion.

MS. CHABER: But up to 9 is the predicate to the
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1032

1 curative portion, and then I'm skipping over to the
curative
2 portion and rephrased the question in a manner that was not
3 improper.

4 MR. BRAKE: I think the curative portion is page 26,
5 which is all the testimony really has the ability, and he
6 gives it on page 26.

7 THE COURT: I think that the section that I
designated

8 before should be omitted on page 24.

9 MR. BRAKE: We were at page 51, and my objection is
10 from page 51, line 17, till 53, line 1. And I have two
11 objections. This is where he asked: Well, when you went
to
12 the plant, did you know what they were manufacturing?

Yeah,

13 filter media for cigarettes. And basically the question
is
14 put: How did you react to the fact, which is actually an
15 opinion question. What's your opinion of that is really
16 what the question is. And he goes on to say he was
17 appalled, but he didn't have power to do anything about
it.

18 And my fundamental objection is to this I was
19 appalled, and then: Can you tell us why you were
appalled?

20 He's giving essentially an opinion, coming as an expert
21 witness and saying, this is really, in my opinion as a
22 second year industrial hygiene inspector, this was really
a
23 terrible thing, and I don't think they have the foundation
24 nor -- in fact, he demonstrably does not have the
expertise

25 to give that kind of opinion. That actually has been
26 excluded on the basis of opinion before.

27 MS. CHABER: It's also been admitted in another
trial.

28 MR. BRAKE: It's been excluded in California.
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1033

1 MS. CHABER: It was admitted in Philadelphia.

2 MR. BRAKE: It's also, I would suggest, Your Honor,
3 unduly prejudicial. This notion that some inspector one
4 year out of Plymouth State College was supposedly appalled
5 by this has, I think, little probative value. He talks
6 about the hazards of asbestos later in deposition in both
of
7 our designations, what was known with precision, and this
is
8 just prejudicial.

9 MS. CHABER: Your Honor, they have raised that
people,
10 during that time period, that putting the asbestos in the
11 filter was a good idea and everybody agreed with them that
12 it was a good idea.

13 And this is a person who was working out there in
the
14 field at the time at that plant who knew what they were

15 doing who did not think it was a good idea to put asbestos
16 in the filter of something that was going into a cigarette
17 that was designed to be inhaled into people's lungs.
18

This goes precisely to the point of the issue of
state

19 of the art and of state of mind during that time frame.
20 They'd like to say that the AMA sanctioned asbestos in the
21 filter because, when they wrote an article about filter
22 cigarettes and whether they effectively filtered out tar
and
23 nicotine, they mentioned the word asbestos, and therefore,
24 by that, they were sanctioning its use in a filter of the
25 cigarette, which they clearly did not in later editorials
26 that they've written.

27 But the point is this is somebody at the time who
was
28 in a position to know, who had opinions about asbestos --

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1034

1 that was his job, to have opinions about it -- who was
2 expressing that it was not a good idea to put asbestos in
3 the filter, and this goes directly to the heart of the
issue

4 on that.

5 MR. BRAKE: The only thing I want to point out, Your
6 Honor, I don't want to reargue what I did, but on page 53,
7 counsel had -- her designation runs from page -- line 1 is
8 where my objection ends, and from 3 to 20, he goes on to
9 say -- and if I could think of a way to exclude it, I'd

like
10 to. But given Your Honor's prior ruling about this man
and
11 knowledge, so be it.

12 From 3 on he testifies to what Ms. Chaber is saying.
13 He says that he was curious as to why they would do that,
14 and he asked H and V why they would do it, and they said
15 they thought it was -- apparently felt, he actually says,
16 apparently felt it was a satisfactory use of asbestos.

What

17 I'm objecting to is his opinion and the prejudicial nature
18 of it.

19 THE COURT: I think he gives an answer, Mr. Brake.
20 He's indicated on page 53 he says it's a toxic material.

21 MS. CHABER: I understand that, Your Honor, but with
22 respect to the issue of whether it was a good idea, which
23 they raised -- they raised the issue in opening statement
24 that it was a good idea to put the filter and everybody
25 agreed with them. This is one person in a position to
know

26 who did not agree with them. And they spent --
27

28 THE COURT: Where does it say -- are there questions
and answers with respect to who this person is?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1035

1 MS. CHABER: Oh, yes, absolutely.

2 THE COURT: Where is that? I haven't read it.

3 MS. CHABER: All through the beginning.

4 MR. BRAKE: There's really not much --

5 MS. CHABER: He was born in 1927. His first position
6 was with occupational health. He went to the Department of
7 Occupational Health, took six months in training in air

8 sampling and in ventilation control.
9 MR. BRAKE: Actually, Your Honor, the clearest part,
10 if counsel will allow me, there's a little bit about his
11 current jobs and his jobs in Massachusetts state
industrial
12 regulatory agencies.
13 But from page 59 to 70, which counsel has
designated,
14 I asked him a series of questions about who he was and
what
15 was his background before 1952. There's 11 pages about
it.
16 He essentially had graduated from teachers college,
Plymouth
17 State, with a math degree in October of '51, had joined
the
18 division of occupational hygiene, and had been there for a
19 year.
20 THE COURT: Does it tell what his training
background
21 and experience is?
22 MS. CHABER: Yes. He studied filtration at Plymouth
23 State, he had chemistry, qualitative and quantitative
24 analysis, did a lot of filtration.
25 MR. BRAKE: Where does it say that?
26 MS. CHABER: On page 61. He got his degree in '49,
27 then went into the Navy.
28 MR. BRAKE: We are not going to finish this one
before

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1036
1 10:00, and I think we would all agree it would be better to
2 start with Dr. Horn. Perhaps Your Honor could take it
under
3 advisement and read his qualifications.
4 THE COURT: All right. I'll do that.
5 MR. BRAKE: Thank you, Your Honor.
6 MS. CHABER: I would ask you to look at sections
7 beginning on page 59, but also going through 60 --
8 THE COURT: 60 what?
9 MS. CHABER: 70.
10 MR. BRAKE: I designated 70 and 71, but yeah.
11 THE COURT: All right. I'll read it.
12 MR. BRAKE: Another objection I had, on 54,
beginning
13 at line 16, running over until 55, line 21, he's shown one
14 of the ever present advertisements, and he's asked -- he's
15 read part of the advertisement. Then he's asked a series
of
16 opinion questions.
17 Would he consider it accurate to characterize an
18 asbestos cotton mixture as dust-free? No. Could it be
19 completely harmless? No. Could it be safe? Well,
dynamite
20 is safe if it doesn't go off, but the potential is
certainly
21 there for an unsafe situation.
22 My objection, Your Honor, is that's clearly an
attempt
23 to create prejudicial testimony. The ad says what it
says.
24 There can be independent testimony about this mixture as

it
25 ended up in the filter, whether it's safe or not. This
man
26 really should not be giving an opinion on that. It's not
27 relevant. Its probative value, which is essentially nil,
is
28 outweighed -- it's an attempt by the person that took this
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1037
1 deposition to create a nice piece of prejudicial evidence,
2 and I would respectfully ask that be excluded.

3 MS. CHABER: Your Honor, if he was here in court --

we
4 go through this all the time with depositions. If he is
5 here in court, those ads are in evidence -- we would be
6 entitled to ask this man, back then, not present day, back
7 then, when you were going to the H and V plant, would you
8 consider it to be accurate to characterize an asbestos
9 cotton mixture as dust-free. Those are perfectly
10 permissible questions.

11 That's their characterization of the cigarette
filter

12 being safe, dust-free and completely harmless, and he
13 certainly could be questioned about, back then, whether he
14 would consider that an accurate representation.

15 MR. BRAKE: The thing is what it really is, is a
16 toxicological opinion with an incomplete hypothetical.
17 Could a cotton asbestos mixture be safe, completely
18 harmless, dust-free. It all depends on a wide variety of
19 circumstances.

20 All they are really doing is showing him the
21 advertisement that they like to take issue with and
saying:

22 It sounds kind of crazy to you, doesn't it? Well, yeah,
23 dynamite could be safe if it doesn't go off, but this
24 doesn't seem safe. It's not real evidence of anything.
25 It's an attempt to create a nice prejudicial expression
for
26 the jury.

27 I'll submit it, Your Honor.

28 THE COURT: Okay. I'll let it in.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1038
1 MR. BRAKE: That's all my objections to volume 1,
Your
2 Honor.

3 MS. CHABER: And I agree with Mr. Brake --
4 THE COURT: We will take our recess then until 10:00
5 and all the jurors get here. And we will finish with
6 Dr. Horn without recess, unless it goes beyond 12:15.

7 MS. CHABER: Okay.

8 THE COURT: And if you see the jurors nodding, go
over

9 and pinch them.

10 (Recess taken.)

11 (In open court in the presence of the jury.)

12 THE COURT: Good morning ladies and gentlemen.

13 JURORS: Good morning.

14 THE COURT: Once again, we are altogether, everybody
15 is here, so he's under oath, and have you finished with
his

16 examination?
17 MS. CHABER: No, I have not.
18 THE COURT: All right. You may proceed then.
19 BARRY L. HORN, M.D.,
20 having been previously duly sworn, resumed the stand and
21 testified further upon his oath as follows:
22 CONTINUED DIRECT EXAMINATION BY MS. CHABER
23 MS. CHABER: Q. Dr. Horn, yesterday we looked at
24 chest x-rays and CT scans in relation to Dr. Horowitz and
25 the mesothelioma. I'd like you to look at this two-page
--
26 well, actually let me show counsel and have it marked.
27 Sorry.
28 MS. CHABER: I'd like to have marked as next in
order

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1039

1 a January 17, 1995 CT scan report.
2 THE CLERK: Plaintiffs' 28 marked for identification.
3 (Plaintiffs' 28 marked for identification.).
4 MS. CHABER: Q. Dr. Horn, are you familiar with
5 Plaintiffs' 28?
6 A. Yes.
7 Q. And what is that?
8 A. This is a copy of the report of the CT scan done on
9 January 17th, 1995 at Tower Imaging in Los Angeles.
10 Q. And is that a report of a CT scan that you showed
the
11 jury yesterday?
12 A. Yes.
13 Q. Is there any indication on that CT scan report that
14 Dr. Horowitz has an asbestos-related condition other than
15 mesothelioma?
16 A. Yes.
17 Q. And what is that?
18 A. I'll quote from the report. "There is faint,
somewhat
19 lacy calcification seen at the right lung base, which is
20 probably pleural."
21 Q. And what is that describing?
22 A. Pleural plaque, calcified plaque, involving the
23 diaphragm.
24 Q. And that is what you pointed out yesterday?
25 A. Right.
26 Q. And do other things cause calcified plaques?
27 A. Not there.
28 Q. When you say "not there," what do you mean by that?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1040

1 A. Really, the only thing that causes calcification in
2 that way in that location is prior asbestos exposure.
3 Q. And when you see that in an individual, if you did
not
4 have a history of exposure to asbestos, what would you
think
5 caused that?
6 A. I would say I may not have the history, but that
7 person was exposed to asbestos.
8 Q. Dr. Horn --
9 MS. CHABER: I'd move that into evidence, Your Honor.
10 MR. OHLEMAYER: No objection.

11 THE COURT: It may be admitted.
12 (Plaintiffs' 29 received in evidence.).
13 MS. CHABER: I'd like to have marked as plaintiffs'
14 next in order, a summary of medical charges.
15 THE CLERK: Plaintiffs' 29 marked for
identification.
16 (Plaintiffs' 29 marked for identification.).
17 MS. CHABER: Q. Dr. Horn, have you had an
opportunity
18 to review the summary of medical charges relating to
19 Dr. Horowitz?
20 A. Yes.
21 Q. And those are charges from when to when?
22 A. From June 22nd, 1994 through July 14th, 1995.
23 Q. Did you review his medical records in the past?
24 A. Yes.
25 Q. And is everything, all of the treatment and care
that
26 he has had with respect to the mesothelioma, reflected on
27 that summary of charges?
28 A. No.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1041
1 Q. What's missing from that?
2 A. None of the charges from Cedar Sinai are included in
3 this list. This includes everything but Cedar Sinai.
4 Q. What is the total of the medical charges that are
5 included in Plaintiffs' 29?
6 A. \$52,816.
7 Q. And what did he have done at Cedar Sinai that is not
8 included in there?
9 A. Well, he had an operative procedure done in mid-July.
10 He had a procedure called throacoscopy which I described
to
11 the jury. That's done in the operating room. He was in
the
12 hospital overnight and obviously, the hospital bill for
13 these services. He was in the operating room. There were
14 all the nurses and all the equipment and everything, so
none
15 of that is included. He also had a couple of trips to the
16 emergency room in January, and those bills aren't
included,
17 either.
18 Q. And what would be the cost of the hospital charges
for
19 the thoracoscopy?
20 A. That would depend on the time. Somewhere between 5-
21 and \$10,000.
22 Q. And emergency room visits?
23 A. Couple of hundred dollars each.
24 Q. So that in addition to the 52,000 on the medical
25 summary, how much more would you add for what's not
26 reflected there?
27 A. Somewhere between 5- and \$10,000.
28 Q. Is Dr. Horowitz likely to require care in the
future?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1042
1 A. Oh, there's no question he'll require care in the
2 future.

3 Q. And what kinds of things will he require, is it
likely
4 that he will require care for?
5 A. Well, let's, for the moment, assume that he doesn't
6 get anymore aggressive care from this point on. That is,
he
7 doesn't receive radiation or chemotherapy.

8 As this disease advances -- he's been very fortunate
9 that he's responded to treatment, but this disease will
10 advance and the malignancy will kill him.

11 As the disease advances, he will have increasing
12 problems. He'll be seeing his physician regularly. He
will
13 have increasing shortness of breath over time. He will
14 require oxygen at some point in time. He will have
15 increasing pain over time, because the malignancy will
16 invade the chest wall. So he'll have the costs involved
17 with getting pain medication and, depending upon the
extent

18 of the pain, it can get fairly sophisticated in terms of
19 pain regimen.

20 He is likely to be hospitalized at least one more
time
21 before he dies because of some complication that occurs.
22 Commonly, individuals develop recurrence of pleural fluid
--
23 that's fluid around the lining of the lung -- making them
24 increasingly short of breath, and they need to be admitted
25 to drain the fluid, or they are admitted because pain gets
26 out of control, and they need to be readmitted to get on
an
27 appropriate pain regimen, and sort of gain control of
28 situations that are out of control. So it's likely,

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1043

1 assuming he has only conservative care, he will be admitted
2 again.

3 Later, in the stage of this disease process, he, in
4 addition to being very short of breath and having a lot of
5 pain and being on a lot of pain medication, he will lose
6 weight, he'll become progressively weaker, and as the
7 disease advances, he'll be able to do less and less for
8 himself, and he'll need more and more help, including help
9 with his daily activities that, I presume, now he's able to
10 do on his own.

11 He will eventually require 24-hour-a-day,
12 seven-day-a-week care. And if you pay somebody to do that
13 in the metropolitan area, such as this and Los Angeles,
that

14 costs about \$150 per eight-hour shift.

15 So assuming he doesn't have any further aggressive
16 care, but is treated symptomatically and to keep him
17 comfortable, his care from this point on will cost
somewhere

18 in the order of about \$50,000.

19 Now, if he's treated aggressively from this point,
20 because the disease recurs, and it wouldn't surprise me if
21 his physicians were to elect to do so, because he's
already

22 responded, clearly, to treatment, then the costs increase
23 substantially.

24 Q. Let me just stop you there a second.

25 If Dr. Horowitz was your patient, given the response
26 that he's had to chemotherapy, would you recommend
27 additional chemotherapy?
28 A. When the disease recurs? Yes, I would.
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1044

1 So if you start giving him chemotherapy again, then
2 the costs multiply. So if he gets additional chemotherapy
3 similar to what he had before, you're talking about another
4 30 to \$50,000 on his costs.
5 And his oncologist, the doctor treating his cancer,
6 was not fooling with him, treated him very aggressively
with
7 chemotherapeutic agents. And if you're going to treat this
8 malignancy, you treat it. You don't fool with it. The
risk
9 of having significant side effects from treatment is pretty
10 high. So his risk of having a complication from the
11 chemotherapy is really quite high.

12 The typical complication that occurs is the
13 chemotherapy wipes out the white blood cells and your
14 ability to fight infection disappears, and then you
15 become -- you develop overwhelming infection and need
16 admission for this. This is very common in people who are
17 aggressively managed with chemotherapy. And the cost for
18 that kind of hospitalization might be anywhere from 10,000
19 to \$50,000, depending upon how sick he got and how
20 aggressively he was managed during the hospitalization.

21 So potentially, if he's just treated conservatively
22 from this point on, the costs for care will be in the
order

23 of \$50,000. If he's treated more aggressively, which he
and
24 Dr. Horowitz and his physicians would need to decide what
to
25 do -- that isn't my decision, although if I were treating
26 him, I probably would recommend it -- you're now adding
27 probably another 50 to \$100,000 to his future costs of
care.

28 Q. Yesterday you said that mesothelioma patients tend
to

 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1045

1 end up on oxygen?
2 A. Yes, he will wind up on oxygen.
3 Q. And why is that?
4 A. Because the malignancy makes that lung ineffective.
5 The malignancy, as it grows and becomes more space
6 occupying, the underlying lung has to get smaller and
7 smaller, and it also invades the lung.

8 And as that lung gets smaller and smaller, it becomes
9 less and less efficient. That is, the purpose of the lung
10 is to get the air to mix with the blood. If air is not
11 going into the lung or the lung is invaded by cancer
tissue,

12 then you don't properly mix air with blood, and the blood
13 that comes out of the lung doesn't get adequately
14 oxygenated, so you wind up short of breath. The symptom
you
15 get from that, if you don't get adequate amount of oxygen
16 in the blood, is you are short of breath.

17 Q. Is Dr. Horowitz likely to die from mesothelioma?
18 A. This malignancy will kill him.
19 Q. And in your opinion, will it kill him before his
20 normal life expectancy?
21 A. Yes.
22 Q. Dr. Horn, let me switch topics for a second.
23 Are you familiar with any medical articles or
comments
24 in medical articles regarding whether the AMA sanctioned
25 advertising of Kent cigarettes in medical journals?
26 MR. OHLEMEYER: Your Honor, advertising of
cigarettes
27 or any other products is beyond this witness' stated and
28 described areas of expertise, and I object on the basis of
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1046
1 relevance.
2 THE COURT: I think you better lay a foundation for
3 it.
4 MS. CHABER: Q. Dr. Horn, the Journal of the
American
5 Medical Association, is that a familiar journal to you?
6 A. Yes.
7 Q. And is that something that you read?
8 A. Yes.
9 Q. And have you read, in the past, articles and
10 editorials in the Journal of the American Medical
11 Association?
12 A. Yes.
13 Q. And have you done so in the course of becoming
14 knowledgeable about the work that you do as a pulmonary
15 doctor?
16 A. Yes.
17 Q. And is one of the issues that you look at, as a
18 pulmonary doctor, cigarette smoking?
19 A. Yes.
20 Q. Are you familiar with any articles by the Journal of
21 the American Medical Association commenting upon cigarette
22 advertising?
23 MR. OHLEMEYER: Same objection, Your Honor. We are
24 still talking about cigarette advertising, not pulmonary
25 medicine.
26 THE COURT: Sustained.
27 MS. CHABER: Q. Dr. Horn, have you seen any
articles
28 by the Journal of the American Medical Association
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1047
1 commenting upon the use of the Journal of the American
2 Medical Association to sanction the smoking of filter
3 cigarettes?
4 MR. OHLEMEYER: Same objection, Your Honor.
5 THE COURT: Sustained.
6 MR. BRAKE: Could I have an instruction when counsel
7 asks a question that seems to contain a fact and you've
8 sustained the objection, that the jury is to disregard the
9 question?
10 THE COURT: Yes. Well, the question is not evidence
11 unless it relates to an answer that is given, so you're to
12 disregard a question if an objection is sustained to the
13 question.

14 MS. CHABER: Q. Dr. Horn, in the course of your
work
15 and study as a pulmonologist, have you taken it upon
16 yourself to become knowledgeable about the state of
17 knowledge with respect to cigarette smoking?
18 A. To --
19 MR. OHLEMAYER: Your Honor, I object to that as
being
20 irrelevant. May we approach?
21 THE COURT: No. I'll sustain the objection.
22 MR. OHLEMAYER: Thank you.
23 MS. CHABER: Q. Dr. Horn, you've taken work
histories
24 and smoking histories from a fair number of individuals?
25 A. Yes.
26 Q. And you've done that in both your work as an expert,
27 such as you are here, and as a treating physician?
28 A. Yes.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1048
1 Q. And in the course of taking histories, both work
2 histories and smoking histories, is it part of your
practice
3 to evaluate whether or not the information you're obtaining
4 from people is reliable?
5 A. Yes.
6 Q. With respect to Dr. Horowitz and his smoking history,
7 in your opinion, was Dr. Horowitz's smoking history that he
8 provided reliable?
9 MR. BRAKE: Objection, Your Honor. No matter how
good
10 an expert you are on a variety of things, and to come in
and
11 say I think someone else is telling the truth or not
telling
12 the truth seems, to me, an improper question.
13 MS. CHABER: That's not what I'm asking him, Your
Honor.
14 THE COURT: You may ask. Overruled.
15 THE WITNESS: Yes, I thought the information I got
from Dr. Horowitz was very reliable.
16 MS. CHABER: Q. And did you suggest any of that
information to him?
17 A. No. When I ask questions, I don't suggest
information. I ask open-ended questions so I can get
information, so that it's not -- they are not leading or
suggestive.
18 Q. And with respect to asking brands of smoking for
people who have mesothelioma, would you ask that question,
whether the person was sent to you by a lawyer, or whether
another doctor referred that person?
19 A. Wouldn't matter.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1049
1 MS. CHABER: I have nothing further.
2 CROSS-EXAMINATION BY MR. OHLEMAYER
3 MR. OHLEMAYER: Q. Dr. Horn, on the subject of
histories, whether it's a smoking history or an
occupational
4 history or a medical history, you sit down with one of your
5 patients and you ask him some questions and they give you
6

7 some information; is that right?
8 A. Yes.
9 Q. Specifically with respect to Dr. Horowitz and his
10 smoking history, you didn't go out and do any independent
11 investigation to determine whether Dr. Horowitz did or did
12 not smoke any particular brand of cigarettes at a
particular
13 point in time?
14 A. Of course not.
15 Q. And a history is subjective, isn't it?
16 A. I guess you have to clarify what you mean by that.
17 Q. Well, it's not -- as you take it, it's not something
18 that you go out and objectively verify or prove or
disprove?
19 A. No, although I often have a factual basis upon which
I
20 can determine whether the information I'm getting makes
21 sense because of my prior experience.
22 Q. But with respect to a smoking history or even an
23 occupational history, people give you that information,
and
24 that is essentially their recollection of that
information?
25 A. Yes.
26 Q. And recollection can be affected by failure of
memory?
27 A. Of course.
28 Q. It can be -- people can be mistaken about things
that

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1050
1 they tell you in these histories?
2 A. Yes.
3 Q. And the passage of time can affect the accuracy of
4 recollection and memory?
5 A. Well, most of us don't remember everything.
6 Q. Now, yesterday you had the model up there and you
were
7 talking about cilia and things like that. Do you remember
8 that?
9 A. Yes.
10 Q. And you talked a little bit about what cigarette
smoke
11 may or may not do to people's cilia?
12 A. Yes.
13 Q. But the fact is, Doctor, isn't it, that that doesn't
14 have anything to do with mesothelioma?
15 A. What doesn't have to do with mesothelioma?
16 Q. Well, mesothelioma is not associated with cigarette
smoking?
17 A. Nobody has demonstrated that cigarette smoking, per
se, is in any way related to mesothelioma.
18 Q. And, in fact, people who smoke are not more likely
to
21 develop mesothelioma than people who don't smoke?
22 A. That's correct.
23 Q. And there is no evidence that cigarette smoking is a
24 factor in the development of malignant mesothelioma?
25 A. In general, that's correct.
26 Q. You talked yesterday about fiber types, different
27 types of asbestos.
28 A. Yes.

1051

1 Q. And am I correct that in your opinion, all types,
2 amosite, chrysotile, and crocidolite are capable of causing
3 mesothelioma?

4 A. That's correct.

5 Q. And when the EPA or OSHA or anybody sets regulatory
6 standards, they don't distinguish among different types of
7 fibers, do they?

8 A. In the United States, the fiber types are not
9 distinguished. The requirements are the same for all fiber
10 types.

11 Q. Now, you know who Dr. Hammar is, don't you?

12 A. Yes.

13 Q. Dr. Hammar has written this very heavy book on
14 Pulmonary Pathology?

15 A. Yes.

16 Q. And this is a resource, and Dr. Hammer's book is a
17 resource you use in your practice?

18 A. Yes.

19 Q. And if Dr. Hammar is of the opinion that there is no
20 way to distinguish whether one fiber is more or less

likely

21 than another type of fiber to cause mesothelioma, would
you
22 disagree with that?

23 MS. CHABER: Well, I'm going to object. I think
that

24 lacks foundation and misstates Dr. Hammer's testimony.

25 THE COURT: Rephrase the question.

26 MR. OHLEMAYER: Q. Let me ask you to assume,
27 Dr. Horn, that Dr. Hammar is of the opinion that there is
no
28 way to make a distinction between the fiber types and
their

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1052

1 ability to cause mesothelioma. Would you disagree with
2 that?

3 MS. CHABER: Same objection, Your Honor.

4 THE COURT: Overruled.

5 THE WITNESS: If that's what he believed, I would
6 disagree with him.

7 MR. OHLEMAYER: Q. And reasonable people can come to
8 different conclusions about different topics in science and
9 medicine?

10 A. Well, when there's data in the literature that's
less

11 than complete, it's open to interpretation, and different
12 investigators may interpret the literature differently.

13 When the data is complete, usually everybody agrees.

14 Q. For example, Dr. Horn, there are investigators and
15 researchers who have looked at the topic and the subject
of

16 whether there is a certain amount of asbestos that's
17 necessary to cause mesothelioma?

18 A. Some people have expressed the view, based upon
their

19 own opinion, not based upon data that they have published
in
20 the literature or they reference, in which they believe

21 there's a threshold below which you are not at increased
22 risk.
23 Q. And you've read some of those articles?
24 A. Yes.
25 Q. And some of those articles are epidemiological in
26 nature?
27 A. There are epidemiologic studies that have been done
28 which have not demonstrated cases of mesothelioma, at
least

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1053
1 in that population group that had been studied up to that
2 time.
3 Q. And some of those researchers have done pathological
4 investigations to try to answer that question? They have
5 looked at fiber burden, lung tissue?
6 A. There are investigators that have done fiber burden
7 analyses and based upon those analyses, have come to
certain
8 conclusions.
9 Q. And one of the things that you told us yesterday, one
10 of the subjects that you have not done any original
research
11 or published any papers on is the physical dimensions of
12 asbestos fibers present in the lungs of individuals with
and
13 without asbestos-related disease?
14 A. No, I haven't done any original research on it.
15 Q. And you're familiar with and recognize, as an
16 authority, a man by the name of Fred Pooley who has done
17 some research and published some data on that subject?
18 A. Yes, he's done a lot of work in which he's measured
19 fiber size in samples from individuals who had varying
lung
20 disease from asbestos.
21 Q. Now, the majority of mesothelioma in this country is
22 caused by occupational exposure to asbestos?
23 A. That's correct.
24 Q. And you don't know if every case of mesothelioma in
25 this country is caused by exposure to asbestos?
26 A. There are clearly individuals who have developed
27 mesothelioma who have not had an occupational or
28 paraoccupational exposure to asbestos. I don't know what

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1054
1 the cause of mesothelioma is in those individuals.
2 Q. The majority of cancers have no known cause?
3 A. The majority of -- overall? You're asking a general
4 question?
5 Q. Yes.
6 A. Yes, the majority of malignancies do not have a known
7 cause.
8 Q. In a tumor or a cancer that has an identifiable
cause,
9 for example mesothelioma and asbestos, it's possible, isn't
10 it, that there may be other causes of that tumor that have
11 yet to be discovered or identified?
12 A. Yes.
13 Q. Not every exposure to asbestos causes mesothelioma?
14 A. That's right, not everyone who is exposed to
asbestos

15 develops mesothelioma.
16 Q. And you don't know why?
17 A. I don't know why some do and some don't.
18 Q. And you don't believe that exposure to one asbestos
19 fiber is sufficient to cause mesothelioma?
20 A. I think it's doubtful, because in order for a normal
21 cell to become a malignant cell, multiple changes in DNA
22 need to occur, and I'm hard-pressed to believe that one
23 fiber would be responsible for the multiple changes in
24 specific areas in DNA which need to occur to get a
malignant
25 cell.
26 Q. You think it takes more than one fiber?
27 A. To answer that question with some reasonable
28 certainty, I would obviously need to know the mechanism of
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1055
1 how this happens, and I don't know, nor does anyone else.
2 But just on the basis of what I know about science and the
3 epidemiology of this disease, I'm hard-pressed to imagine
4 that one fiber would do it.
5 Q. You'll agree with this, won't you, that somewhere
6 between one fiber and some large number of fibers is the
7 minimum level of exposure to asbestos necessary to cause
8 mesothelioma?
9 A. Yes.
10 Q. And the things that put somebody at risk for
11 developing a disease are not necessarily the things that
may
12 cause that disease in an individual?
13 A. Well, that may be so. Its conceivable that there
are
14 other factors involved which have yet to be identified
that
15 put you at greater risk, so it's not just the specific
16 agent, but there may well be another factors involved
which
17 we don't understand yet.
18 Q. The ability of asbestos to cause lung disease,
19 pulmonary disease, depends on the duration and intensity
of
20 exposure and the deposition and retention of that asbestos
21 in somebody's lungs?
22 A. I would rather put it that your risk for developing
23 disease from asbestos is a function of the amount of
24 asbestos you inhale and retain in your lung. And the
amount
25 you inhale and retain in your lung will be a function, in
26 part, regarding the intensity of exposure and the duration
27 of exposure.
28 Q. And the risk associated with exposure to asbestos
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1056
1 depends upon being exposed to single respirable asbestos
2 fibers?
3 A. Yes, or at least the body has to be able to break
them
4 down into single fibers.
5 Q. And something that is respirable means more than you
6 can inhale it?
7 A. Well, respirable means you would inhale it. In this

8 case, we are talking about fibers that are of a size that
9 you inhale and retain in your lung, down in the terminal
10 bronchials, in the very small areas, and in the air sacs
11 down in your lung.

12 Q. And the people who are exposed to asbestos can be
13 exposed to asbestos that is not of a size and of a shape
14 that it can get to the terminal bronchials and that part
of
15 the lung?

16 A. That's correct.

17 Q. And I think you told me earlier that one researcher
18 who has studied that very subject is Fred Pooley?

19 A. Yes.

20 Q. Now, in order for you to reach the opinion that you
21 gave us yesterday about Mr. Horowitz and Kent cigarettes,
22 you have to make some assumptions, don't you?

23 A. Well, I'm relying on the work of Dr. Longo published
24 in June.

25 Q. You have to assume that Dr. Horowitz smoked Kent
26 cigarettes when the filter had asbestos in it?

27 A. That's right.

28 Q. You have to assume that the filter released single
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1057

1 respirable asbestos fibers when it was smoked?

2 A. Yes.

3 Q. You have to assume that sufficient number of them
were

4 deposited and retained in the lung?

5 A. That's correct.

6 Q. So if the filter material didn't release asbestos, it
7 couldn't have caused the disease?

8 A. Well, if it didn't release asbestos, I don't quite
9 know how it would cause disease.

10 Q. Fair enough. Now, with respect to Dr. Horowitz, you
11 aren't his family doctor?

12 A. No, I'm not.

13 Q. You weren't his treating physician?

14 A. No,

15 Q. You weren't involved in his diagnosis or his
16 treatment?

17 A. I was not.

18 Q. And, in fact, you saw him in December?

19 A. Correct.

20 Q. And you haven't seen him since?

21 A. I have not.

22 Q. Ms. Chaber's office hired you to evaluate some
medical

23 records, talk to Mr. Horowitz and his wife and determine
the

24 potential exposure to asbestos he might have had in
25 connection with the lawsuit?

26 A. Yes.

27 MR. OHLEMEYER: Let me mark these as the next in
28 order.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1058

1 MS. CHABER: May I see them?

2 MR. OHLEMEYER: Sure.

3 THE CLERK: Defendants' Exhibit C marked for
4 identification.

2 A. Right.
3 Q. And the re line on that letter says what, Doctor?
4 A. "Medical examination for asbestos lawsuit."
5 Q. Then on December 5th -- let me hand you Defendants'
6 Exhibit E. You were sent some x-rays and other medical
7 records from Mr. Horowitz's attorneys?
8 A. Well, I was sent medical records.
9 Q. Do you see the beginning of the second paragraph
there
10 where it says that "Dr. Horowitz is concerned about the
11 numerous sets of x-rays he is undergoing" --
12 A. Yes.
13 Q. -- "so he will be bringing a very recent CXR," which
14 means chest x-ray --
15 A. Yes.
16 Q. -- "study"?
17 A. Yes.
18 Q. Did you and Dr. Horowitz talk about his concern
about
19 those x-rays?
20 A. I guess we did. I don't remember.
21 Q. You don't remember discussing that with him?
22 A. No.
23 Q. Then on December 9th, the Horowitzes came to see
you?
24 A. Yes.
25 Q. And let me hand you Defendants' F. You asked
26 Dr. Horowitz to fill out a questionnaire?
27 A. Right.
28 Q. And on the back page of that questionnaire -- by the
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1061
1 way, did he fill it out or did you or one of your staff
2 record the answers for him?
3 A. No, either he filled it out or his wife filled it
out.
4 We didn't fill it out.
5 Q. On the back page there is a chart. Is that a chart
6 that your office has prepared?
7 A. Yes.
8 Q. And the chart asks Dr. Horowitz to fill out, from his
9 current job and go backwards, the company and location
where
10 he worked, the type of industry it was, the period he
worked
11 there, his job title, his job description, the hours per
12 week he worked, exposures and protective measures?
13 A. Right.
14 Q. And by exposures, what is it that you intend?
15 A. Well, it would depend upon what the issue is. So
for
16 instance, if I were seeing somebody because of an issue
17 regarding asbestos, I would hope they would include that,
18 whether they were exposed. If I saw somebody with coal
19 workers' pneumoconiosis, that was the issue, they would
put
20 where they had been exposed to coal. If the issue were
21 occupational asthma and they were exposed to a particular
22 agent that causes it, that they would identify in that
space
23 what they were exposed to.
24 Q. What did Dr. Horowitz identify in that space?

25 A. Nothing.
26 Q. Now, at the time that you saw Dr. Horowitz, you knew
27 there had been a lawsuit filed?
28 A. Well, I don't know if I knew a lawsuit was filed. I
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1062
1 knew I was seeing him for the purpose of potentially a
2 lawsuit being filed.

3 Q. Did you know who any of the defendants to that
lawsuit
4 might have been?

5 A. No.
6 Q. You took what you've described as a smoking history
7 from Dr. Horowitz?

8 A. Yes.

9 Q. And that's not unusual, you take smoking histories
10 from all your patients?

11 A. Every patient I see.

12 Q. And Dr. Horowitz told you that he began smoking
13 cigarettes sometime in the middle '40s?

14 A. 1944.

15 Q. Quit sometime in the early '60s?

16 A. New Years' Day 1963.

17 Q. That's what he told you?

18 A. Right.

19 Q. And he told you that he quit when he first became
20 aware of the effects associated with smoking?

21 A. Right.

22 Q. He told you what brands of cigarettes he smoked over
23 the years?

24 A. Right.

25 Q. He told you that he smoked Old Gold, Lucky,
26 Chesterfield and Kent?

27 A. Correct.

28 Q. And he told you that he started smoking Kent
sometime

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1063
1 after he moved to Cleveland?
2 A. Right.
3 Q. And he moved to Cleveland in 1952?
4 A. In February 1952.
5 Q. And that he smoked Kents until he quit smoking?
6 A. Correct.
7 Q. And that when he started smoking Kent, the filter was
8 pale blue?
9 A. Right.
10 Q. And that the filter -- the color of the filter
changed
11 to white, four to five years after he started smoking?
12 A. Right.
13 Q. And that he smoked less than a pack a day?
14 A. Well, from '52 to '63, he smoked about a pack a day.
15 Q. In your report that you prepared and sent to
16 Ms. Chaber, you note the fact that Dr. Horowitz described
17 the color of the filter and the change in the color of the
filter?
18 A. Right.
19 Q. Why did you do that?
20 A. I thought that was very interesting information. I
21 never heard that from anybody before and I didn't know

that

23 myself, and I thought that that was very fascinating
24 information. It demonstrated he was very alert, and I
25 thought that represented the fact that the smoking history
I
26 was getting was accurate.

27 Q. You told Dr. Horowitz, then, that there was asbestos
28 in the filter material used in Kent cigarettes?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1064

1 A. Yes.

2 Q. And that was something that was news to him?

3 A. I don't remember that.

4 Q. You talked with Dr. Horowitz about his work history?

5 A. Yes.

6 Q. He told you that he was on a troop ship in 1946?

7 A. Correct.

8 Q. And that there were steam pipes in poor repair on the
9 ship?

10 A. Right.

11 Q. He told you that --

12 A. Well, actually, he said that the whole ship was in
13 poor repair.

14 Q. And why is that significant?

15 A. Well, I think he was exposed to asbestos during that
16 time. Ships vibrate and asbestos-containing materials

that are on pipes deteriorate because of the vibration in the
18 steam lines, and free asbestos fibers are liberated in

that situation aboard ship. The worse shape the ship is in,
20 probably the greater the exposure one would have.

21 Q. Dr. Horowitz told you about the construction that

was ongoing near his places of employment in Cleveland and Los
23 Angeles?

24 A. Yes.

25 Q. And he told you about the possible presence of
26 asbestos in his [DELETED] home?

27 A. Yes.

28 Q. Did you tell him that the troop ship, the
construction

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1065

1 sites, and the pipe coverings in his home were potential
2 sources of exposure to asbestos?

3 A. I don't recall if I did that.

4 Q. You looked at some of Dr. Horowitz's medical records?

5 A. Yes.

6 Q. And there's nothing in those medical records to
7 indicate a history of exposure to asbestos?

8 A. That's correct.

9 Q. Now, let's talk about Dr. Longo for a minute. The
10 information about Dr. Longo's experiment was sent to you
by

11 Mr. Horowitz's attorneys?

12 A. Yes.

13 Q. And designing or conducting that kind of an
experiment

14 is not something within your area of expertise?

15 A. That's correct.

16 Q. And you don't have -- you haven't seen a videotape
of
17 his experiment?
18 A. No.
19 Q. You haven't seen the photographs of his experiment?
20 A. Well, there were some photographs published in the
21 article.
22 Q. But you haven't seen the photographs of how the
23 experiments was conducted?
24 A. No, I have not.
25 Q. You haven't looked at the data from the raw
26 experiment?
27 A. Well, I saw a preprint. There was data in the
28 preprint.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1066

1 Q. But have you seen Dr. Longo's accounting sheets where
2 the size and shape of the asbestos structures he observed
3 were described?
4 A. No.
5 Q. Now, you do know that Dr. Longo's experiment used
nine
6 cigarettes?
7 A. Correct.
8 Q. From a 40-year-old pack?
9 A. Correct.
10 Q. With an unknown history?
11 A. I don't know what you mean by "an unknown history."
12 Q. Do you know anything about the history of that pack,
13 where had it been over those 40 years?
14 A. No. Well, in his article, he indicated that a
15 collector had the packs.
16 Q. And you know that he smoked those cigarettes by hand
17 in a syringe?
18 A. Right.
19 Q. Now, let me ask you to make some other assumptions,
20 Dr. Horn.
21 Let me ask you to assume that at the time Dr. Longo
22 did this experiment, there were machines available to
23 mechanically smoke cigarettes, and that there were
published
24 standards that one could refer to that describe how
25 cigarettes should be smoked on a machine for analytical
26 purposes.
27 And let me ask you to assume that at the time
28 Dr. Longo did this experiment, he hadn't seen such a

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1067

1 machine, he hadn't used such a machine in the experiment,
2 and he hadn't read those published standards.
3 Let me also ask you to assume that it took between 30
4 seconds and almost two minutes to insert the cigarettes
into
5 the syringe before they were smoked.
6 Let me also ask you to assume that several of the
7 cigarettes were pinched or rolled by hand before they were
8 inserted into the syringe.
9 Let me ask you to assume that Dr. Longo did no test
to
10 determine whether inserting the cigarettes into the
syringe

11 could account for the asbestos structures he observed in
the
12 syringe.

13 Let me ask you to assume that the cigarettes were
14 smoked by sealing the cigarette in the syringe with
silicone

15 caulk, lighting them, pulling the plunger to puff them by
16 hand, letting the syringe sit for up to 90 minutes or, in
a
17 couple of cases, several days, removing the caulk,
removing

18 the cigarette, repeating the process again, and that
19 before --

20 Let me ask you to also assume that before Dr. Longo
21 examined the contents of the syringe, he introduced some
22 water into it, shook it up for ten seconds, let it sit,
23 shook it up for ten more seconds, let it sit.

24 And let me ask you to assume, also, that three years
25 after Dr. Longo did the experiment with the syringe, he
took
26 one cigarette that had been in his drawer for a few years,
27 two cigarettes from the same 40-year-old pack that had
been
28 used in the syringe experiment, and used a smoking
machine,

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1068

1 and that when he examined the results of that experiment,
in
2 which he again did not do any tests to determine whether
3 inserting the cigarettes into the machine could account for
4 the structures he observed, the results he found were a
5 fraction of what he got in the syringe experiment.

6 And finally, let me ask you to assume that
7 Dr. Frederick Pooley, who we talked about earlier, has
8 looked at the videotape, has looked at the data, has looked
9 at the photographs, and has concluded that they provide no
10 evidence of respirable asbestos fibers that might have
been
11 released from the smoke of these cigarettes.

12 If you make all those assumptions, Dr. Horn, in
13 addition to the ones you told us earlier you had made in
14 providing Ms. Chaber with your opinion, might they affect
15 your opinion about the capability of Kent cigarettes
causing

16 Dr. Horowitz's mesothelioma?

17 MS. CHABER: Your Honor, I just want to interpose an
18 objection on the assumption that it lacks foundation in
19 numerous aspects, and particularly lacks foundation that
20 there are any published standards for or any smoking
machine

21 designed to analyze the presence of asbestos fibers in
smoke
22 as improper, no foundation, lacks foundation with respect
to
23 that information. Cigarette smoking machines are designed
24 for tar and nicotine content.

25 MR. OHLEMAYER: Your Honor, that's not an objection,
26 that's a speech.

27 THE COURT: I don't know whether there are standards
28 for testing or not.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 MR. OHLEMAYER: I'll prove it up. All I'm asking him
2 to do is assume all that.

3 THE COURT: Well, assume it. All right.

4 MR. OHLEMAYER: Q. Do you have the hypothetical?

5 THE COURT: You can ask other appropriate questions

in
6 redirect examination, I guess. Overruled.
7

THE WITNESS: I've got it.

MR. OHLEMAYER: Q. Okay. And the answer?

A. It might.

Q. Thank you.

Let me ask you do assume one other thing, Dr. Horn.

12 Assume that Dr. Horowitz didn't smoke Kent cigarettes when
13 there was asbestos in the filter. Do you have an opinion

as
14 to what might have caused his mesothelioma?

15 A. Then his other exposures would have caused it.

16 Q. In your opinion, does Dr. Horowitz have an
17 asbestos-related mesothelioma, whether he smoked Kent
18 cigarettes or not?

A. Yes.

20 MR. OHLEMAYER: Thank you, Doctor.

21 CROSS-EXAMINATION BY MR. BRAKE

22 MR. BRAKE: Q. Doctor, if I were to get that
light

23 box for getting x-rays out here, would you be able to put
24 your hands on the ones we looked at yesterday?

25 A. Sure.

26 Q. I wanted to ask you a couple of things.

27 THE COURT: If anybody wants to stand up and
stretch,

28 please do so. We are not going to take a recess because
we

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 want to finish with the Doctor this morning.

2 MR. BRAKE: Q. Doctor, you had one x-ray, I think,
3 from January '95 that you showed us yesterday of
4 Dr. Horowitz's chest?

5 A. The chest film or the CT scan?

6 Q. The chest film.

7 A. Sure.

8 Q. And you told us, did you not, that looking at that,
9 you could tell us that Dr. Horowitz had pneumonia in

10 January?

11 A. Yes.

12 Q. How do you know that?

13 A. I have the CT scan. I know he had the CT scan about
14 the same time. Just for the sake of time, I didn't show
it

15 to the jury, but he had a significant part of what's in
here

16 represents pneumonia.

17 Q. And I guess what I'm asking is, what is it you see

on

18 that film that would indicate pneumonia?

19 A. Well, there is the pleural base disease around the
20 outside of the lung. Let's go back a film. Here's
21 November. In November of '94, he's got disease around the
22 lining of the lung, and it's on this side, and it's

sitting

23 up in here. It's in the fissure over here. It's
24 undoubtedly on this side, as well, but I can see air down
25 here. There's air from here to here.

26 In here, I now have density down here. It's now
white

27 down here, and this could represent collapse of the lung
28 from the tumor, with the tumor growing, or it represents
an

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1071

1 infiltrate, or conceivably could represent invasion into
the
2 lung.

3 Q. And the fact that it's white here tells you that
4 there's something there? Is that the first thing it tells
5 you?

6 A. Right.

7 Q. And you've --

8 A. It ain't right.

9 Q. Is this called a density or opacity?

10 A. Yes.

11 Q. Is that a term that you would use for that?

12 A. Sure. You could.

13 Q. You could look and see there's a white density and
14 opacity and, given your expertise, you can infer that's
15 pneumonia?

16 A. I don't know from this film, but I know it from the
CT
17 scan.

18 Q. But does pneumonia typically leave a density or
19 opacity on a person's x-ray like this?

20 A. Sure, it can look like that.

21 Q. Does it typically look like that? Does it have a
22 white density or opacity?

23 A. Pneumonia?

24 Q. Yes.

25 A. Yes, because the white means a fluid density other
26 than air, and pneumonia represents fluid in the lung. So
27 the way it will show up on x-ray is the x-ray will be
white.

28 Now, the appearance on the x-ray, what that white
appearance

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1072

1 will be will vary with different kinds of pneumonia. It
2 could be in a very discrete area, it can be in a patchy
sort

3 of way. It varies in appearance, but it will be white.

4 Q. Thanks, Doctor. If you could get the CAT scans out,
5 if you would -- let's do it orderly. Let's start off with
6 June of '94. Could you do that?

7 A. Sure.

8 Q. These are all the CAT scans that were taken of
9 Dr. Horowitz in June of 1994?

10 A. There are more cuts. There's more. This is what I
11 pulled out to show the jury.

12 Q. Now, do you know how many total images were taken of
13 him in June of 1994, approximately?

14 A. How many images?

15 Q. Let's see. We've got --

16 A. Let's start up here. So they start at number 1 and
17 they extend to number 35. So these are the images, and
then
18 you can make them smaller, you can make it bigger. There
19 are -- somewhere the density is different. They are done
to
20 look at the lung rather than the lining of the lung. I
21 pulled out the ones here, you can more easily see the
lining
22 of the lung. So technically, there are 35 images.
23 Q. And from those 35 images, you can generate any
number
24 of CAT scan pictures?
25 A. Yes. You just have the computer do different
things,
26 and you wind up with different pictures.
27 Q. And just so we are clear here, in the June of 1994
28 one, there's no evidence of any of the -- I think it was
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1073
1 called faint lacy pleural calcification?
2 A. I don't see it.
3 Q. And the people who took these at Tower Imaging, they
4 didn't comment that they saw it either, did they?
5 A. Correct.
6 Q. Thanks. In June of -- in January of '95, you have
two
7 images in which the faint lacy calcification is noticed; is
8 that correct?
9 A. That's correct.
10 Q. If Dr. Horowitz had what you called a pleural plaque
11 or a calcification in January of '95, he would also have
had
12 it in June of 1994, wouldn't he?
13 A. That's correct.
14 Q. And if he had it, indeed, it should have shown up on
a
15 CAT scan?
16 A. Well, I might have expected to see it, although in
the
17 face of the fluid density superimposed on top of a
18 diaphragm, it may not be dense enough to see it. For
19 instance, there's some little white ditzels (phonetic)
20 sitting in here which may represent it, and I could not
see
21 it maybe because of the impact of the fluid density
22 superimposed on the diaphragmatic density.
23 Q. When you look at the June 1994 CAT scan, you do not
24 see calcification; correct?
25 A. I don't clearly see it.
26 Q. And there's no explanation you could think of for
why
27 that's so?
28 A. That's about the only explanation I could come up
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1074
1 with.
2 Q. Remember I asked you at your deposition if there was
3 any explanation you could think of why, in 1994, it wasn't
4 noticed, and you said that there was no explanation you
5 could think of?

6 A. I don't remember.
7 Q. The only one you could think of today is the presence
8 of the tumor obscures it in some fashion?
9 A. And the fluid, the fluid density superimposed on top
10 of the diaphragm, you just can't pull it out.
11 Q. Now, Doctor, so this is June, and then we have
12 January, and then the next set he had was taken in April?
13 A. April, right. Do you want to see that?
14 Q. Well, if you want to, we can but I guess I can just
15 ask you: There was no calcification in April, either, was
16 there?
17 A. I don't see it in April, but the problem is, is that
18 down in the lower end of the chest, the CT scans were done
19 every two centimeters instead of every centimeter, and the
20 key area was missed -- just by luck it was missed. It was
21 in between the area where the calcification was seen in
22 January was between the cuts that were done in April.
23 Q. Are you telling us that the faint lacy calcification
24 was just one centimeter thick?
25 A. Yes, because it's sitting on the diaphragm, which is
26 in a plane like this, and that's the plane that the cuts
are
27 done. So if you're a little above it or a little below
it,
28 you're going to miss it.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1075
1 Q. And then in June of '95, another set of CAT scans was
2 taken, too; right?
3 A. That's right.
4 Q. And they didn't see the lacy calcification on that
5 one, either?
6 A. No, the same thing happened. The cuts were done in
7 exactly the same way, and at the base of the lung they were
8 done every two centimeters rather than every centimeter,
and
9 they missed the area.
10 Q. Now, how many images did they take in June,
11 approximately, do you know?
12 A. We could get it out. We can look. I don't know.
13 Q. Why don't you have a seat, and I'll ask you just a
14 couple more.
15 Do you know they took approximately 35 images in
June?
16 A. I don't know. We can count them.
17 Q. Can you check it real quick for me?
18 A. Sure.
19 Q. Where's your thing with the images?
20 A. Well, it's in one of those folders over there. I
21 didn't pull it out.
22 Q. I see.
23 A. I can get it.
24 Q. That's okay. Do you have any reason to think -- go
25 ahead and have a seat. Perhaps we can move the light box.
26 Do you have any reason to believe they wouldn't have
27 taken approximately 35 images in April and June of '95,
just
28 as they had done in January?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1076
1 A. Approximately. But they, instead of doing the images

2 every centimeter, which they did in the middle of the
3 chest,
4 in the lower end of the chest they did them every two
5 centimeters, both in April and in June.
6 Q. And just so it's clear, if Dr. Horowitz had a
7 calcification in January of '95, he would also have had it
in April of '95 and in June of '95?
8 A. That's right. So theoretically, he could use a
9 helical CT scanner which, in one breath, they could do
10 multiple images down at the base of the chest and get it.
11 Q. If somebody did that, they would be able to get a
12 photograph, a CAT scan, of that calcification again?
13 A. That's right.
14 Q. Now, let me show you June 14th, 1995, and ask you if
15 you've seen that before, if you know what that is?
16 A. Yes, I have.
17 Q. And what is that?
18 A. This is the report of the CT scan dated June 14th,
19 1995, from Tower Imaging in Los Angeles.
20 Q. And Counsel asked you to read from the January one,
21 right, about how they had noticed a faint, somewhat lacy
22 calcification?
23 A. Right.
24 Q. Can you tell the jury what they commented on that
issue in this June 1995 report?
25 A. The calcification seen in the pleural mass in the
right costophrenic sulcus on the previous examination are
no
28 longer visualized.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1077

1 Q. So what they are telling us is what they saw in
2 January by way of calcification, they didn't see in June;
3 correct?
4 A. Correct.
5 Q. And you're telling us that it should have been
obvious
6 to them why that was, because they didn't take the picture
7 in the right place; correct?
8 A. Right.
9 Q. The fact is that they took another -- in fact, three
10 out of four sets of CAT scans that he had taken show no
11 calcification?
12 A. That is correct.
13 MR. BRAKE: If Your Honor could give us a moment to
move the box before I resume.
14 THE COURT: All right.
15 MR. BRAKE: Q. Doctor, just a couple other
things.
16 With regard to Dr. Longo's report, you relied upon that in
giving your opinions, you told us? You relied upon, in
particular, a 1991 article?
17 A. 1995 article.
18 Q. Yes, I'm sorry, a study of a test of nine cigarettes
done back in 1991?
19 A. That's correct.
20 Q. And it's clear, isn't it, that you haven't relied,
in
21 giving your opinion, upon any results of subsequent tests
that Dr. Longo did of three cigarettes?
22 A. That's correct.
23 Q. You didn't consider that; correct?

1078

- 1 A. Well, I haven't seen the data.
2 Q. Nobody is asking you to give opinions in this case --
3 nobody provided you with Dr. Longo's test of three
4 cigarettes in 1994?
5 A. I just saw it very briefly yesterday. I would need
to
6 read it.
7 Q. Now, and how did you come to see it yesterday?
8 A. When I was sitting in court waiting to testify.
9 Q. Now --
10 A. Or rather outside the court waiting to testify.
11 Q. Now, you provided a lengthy report, I think it's 16
12 pages of text in this case, in January of '95; is that
13 right?
14 A. That's correct.
15 Q. Comprehensive report, is that fair to say?
16 A. Well, it includes all the information I had
available
17 at the time.
18 Q. And it recounts your discussions with Dr. Horowitz?
19 A. Correct.
20 Q. And you state your conclusion, don't you, that
21 Dr. Horowitz has an asbestos-caused mesothelioma?
22 A. That's correct.
23 Q. And all of his exposures up to ten years prior to
his
24 diagnosis, in your phrase, should be considered a
25 contributing factor in the development of his malignancy;
26 correct?
27 A. Correct.
28 Q. You didn't rank the exposures in this report, did
you?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1079

- 1 A. No.
2 Q. But you came into court and ranked them for us on
3 direct examination; correct?
4 A. Well, I was asked to.
5 Q. Back in January you weren't asked to do that; is that
6 correct?
7 A. Correct.
8 Q. I imagine you get asked this all the time, but very
9 briefly, you have a separate corporation set up for the
10 revenues you derive from testifying in court; is that
11 correct?
12 A. That's correct.
13 Q. You and one other doctor?
14 A. Right.
15 Q. And you do most of the work?
16 A. I do the medical-legal work. He does other
17 activities.
18 Q. And in recent years, you have generated at least on
19 the order of 150,000 a year from this type of work?
20 A. That's correct.
21 Q. And that's been so for about seven years?
22 A. Roughly.
23 Q. So taken together, that's something in excess of a
24 million dollars?
25 A. That's correct.

26 Q. Doctor, you told us, one last thing, that
27 Dr. Horowitz's malignancy would have begun in excess of
ten
28 years ago. Do you remember saying that?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1080

1 A. Yes.

2 Q. And you understand that the issue of when the
3 malignancy first appeared can have some legal significance
4 in these cases?

5 A. Yes.

6 Q. And with particular reference to a date in 1986;
7 correct?

8 A. Yes.

9 Q. And indeed, you've known of the legal significance of
10 this date back into the 1980s; correct?

11 A. Correct.

12 Q. And it used to be when you testified in asbestos
13 cases, up until about 1993, you used to testify that
14 malignancy took about seven to eight years to develop?

15 A. From the time from the first cancer cell to the time
16 of diagnosis or death was in the order of seven to eight
17 years, that's correct.

18 Q. That used to be your testimony; correct?

19 A. Right.

20 Q. And that was up until about 1994, and then what you
21 did is you went back and did some more research?

22 A. In late 1993, somewhere around that range, lawyers
23 began asking me about this in great detail, and began in
24 much more detail than I was able to answer, so that really
25 precipitated me going back to the literature to see
whether

26 there was any information that I didn't know up until that
27 time that would alter my opinion in some way.

28 Q. And then you went back and you found an article by a
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1081

1 Dr. Chahinian?

2 A. I found a whole series of articles by Dr. Chahinian,
3 who is an oncologist at Mount Sinai in New York City.

4 Q. And basically, on Dr. Chahinian's work, you have now
5 concluded it takes more than ten years for the malignancy
to
6 develop?

7 A. That's correct. From the first cancer cell to the
8 time of diagnosis or death, takes at least ten years.

9 Q. And Dr. Chahinian's work was published and available
10 back in the 1980s, wasn't it?

11 A. Right, although I didn't know about it.

12 Q. And it was taking -- June of 1986 was about seven or
13 eight years after that that you went back and did some
14 research on this issue; correct?

15 A. Well, it was about seven or eight years after that
16 that attorneys such as yourself began asking me questions
in

17 great detail, which sort of precipitated that.

18 Q. Seven or eight years after the June 1986 date you
went
19 back and did the research?

20 A. Right.

21 Q. Doctor, that's all I have.

22 REDIRECT EXAMINATION BY MS. CHABER
23 MS. CHABER: Q. Dr. Horn, you responded to a
rather
24 long hypothetical of Mr. Ohlemeyer's --
25 A. Right, long.
26 Q. -- and saying that perhaps your opinion might be
27 changed. Were you indicating that every single one of the
28 things that he asked you to assume if they were true, were

1082

1 all factors in changing that?

2 A. You mean in terms of why I said it might?

3 Q. Yes.

4 A. No, it wasn't all of those issues.

5 Q. Okay. And is there anything in particular that might

6 affect it?

7 A. Well, I'm interested in the issue as to whether you

8 take the end of the cigarette and you -- if Dr. Longo had

9 some considerable difficulty in getting it into the

syringe,

10 what impact that might have had on the release of fibers.

11 Q. Have you seen people smoke?

12 A. Yes.

13 Q. Have you seen people hold the filter cigarettes?

14 A. Yes.

15 Q. Have you seen people roll filter cigarettes?

16 A. Yes.

17 Q. Have you seen people put filter cigarettes in their

18 teeth?

19 A. Yes.

20 Q. And hold them there?

21 A. Yes.

22 Q. It's been a long time since I smoked. This is hard

to

23 do. Have you seen people pinch the ends of cigarettes?

24 A. Yes.

25 Q. And have you seen people fidget with cigarettes when

26 they are smoking?

27 A. Yes.

28 Q. Do you believe that that might affect the release of

1083

1 asbestos in the filter if people did those?

2 A. Well, if I believe what Dr. Longo published, and I

do,

3 it doesn't appear that rolling or pinching the end of the

4 cigarette has any significant impact in the release of

5 fibers. Whether you fool with it or not, fibers are

6 released.

7 Q. And the journal that Dr. Longo published in Cancer

8 Research, is that a recognized journal?

9 A. Yes.

10 Q. Did Dr. Longo describe the process of how he did the

11 experiment?

12 A. Yes.

13 Q. And that's described in the article?

14 A. Yes.

15 Q. So when Mr. Ohlemeyer, as he's been wont to do for

the

16 last couple of days, keeps throwing this syringe around,

17 that wasn't a surprise to you that there was a syringe

18 involved, was there?

19 MR. OHLEMAYER: That's kind of argumentative, Your
20 Honor.

21 THE COURT: It's been asked. He can answer it.

22 THE WITNESS: Yes, a syringe was an important
23 component of the experiment. That provided the negative
24 force so that air would go through the cigarette while it
25 was burning.

26 MS. CHABER: Q. And do you know whether or not a
27 smoking machine has a tube that looks just like a syringe?

28 A. I have no idea.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1084

1 Q. You don't know what smoking machines were designed to
2 do, do you?

3 A. No.

4 Q. And do you know anybody that smokes like a machine?

5 A. I believe I've seen people who have smoked like a
6 machine, yes.

7 Q. And I want you to assume that there were cigarette
8 experiments on Kent cigarettes with the asbestos filter

done

9 at the defendants' request in 1954 regarding the release of
10 asbestos fibers from the Kent filter cigarettes. And I

want

11 you to assume further that the scientists doing that study
12 indeed did find and photograph asbestos fibers under an
13 electron microscope.

14 Does that have any impact on your opinions regarding

15 whether or not Kent cigarettes would be capable of
releasing

16 asbestos fibers?

17 A. Well, that would be confirmatory information that

the

18 studies done by Dr. Longo are valid.

19 Q. Let me ask you a couple of questions. Cigarette
20 smoking, is that a factor in the development of other
21 asbestos-related diseases?

22 A. Yes.

23 MR. OHLEMAYER: Objection, Your Honor; relevance.

24 THE COURT: Sustained.

25

MS. CHABER: My client has, in this Doctor's

opinion,

26 other asbestos-related diseases, Your Honor.

27 THE COURT: We are not talking about other diseases
28 here.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1085

1 MS. CHABER: Well, they are relevant to his case,
2 absolutely, Your Honor, pleural plaque.

3 THE COURT: Restate the question.

4 MS. CHABER: Q. Dr. Horn, does cigarette smoking
5 create -- strike that.

6 Is cigarette smoking a factor in the development of
7 other asbestos-related diseases other than mesothelioma?

8 MR. OHLEMAYER: Same objection, Your Honor.

9 THE COURT: Sustained.

10

MS. CHABER: Q. Can cigarette smoking affect the
11 ability of the lung to retain asbestos fibers?

12 A. Yes.

13

Q. Does the retention of asbestos fibers, can it result

14 in the development of other asbestos-related diseases
15 besides mesothelioma?
16 A. Yes.
17 Q. And what diseases can it relate to?
18 A. The asbestos or the smoking or -- I'm not sure I
19 understand your question.
20 Q. The asbestos, what other asbestos-related diseases
21 besides mesothelioma?
22 A. Are there?
23 Q. Yes.
24 A. There are benign asbestos-related diseases; that is,
25 individuals who are exposed to asbestos can develop a
number
26 of different nonmalignant changes of the pleura, including
27 pleural plaques. Individuals who are exposed to asbestos
28 can develop scarring in the lung. That disease is called
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1086
1 asbestosis. Individuals who are exposed to asbestos can
2 develop a variety of malignancies, not just mesothelioma,
3 but also lung cancer and other malignancies, as well.
4 Q. And can two workers who are working side by side and
5 have this same exposure have different responses to that
6 exposure?
7 A. Of course.
8 Q. And have you seen instances where you've gotten work
9 histories from people that have been the same as work
10 histories from other people and they have different
11 diseases?
12 A. I have seen an enormous number of people who have
13 worked at the local federal civilian shipyards, that is
14 Hunters Point and Mare Island. I've seen an enormous
number
15 of people who have had virtually identical jobs. They
have
16 done the same thing for the same length of time. Some of
17 those individuals have no disease whatsoever. Others have
18 one asbestos-related disease, others have multiple
19 asbestos-related diseases.
20 Individuals who are working in the -- virtually the
21 same environment are all at risk for developing
22 asbestos-related disease, but there appears to be some
23 differences between us, so that some of us are more
24 sensitive than others.
25 Q. Is pleural plaques, calcified pleural plaque, is
that
26 a life-threatening disease?
27 A. Generally no, although individuals can have
extensive
28 enough plaque so they can be quite impaired. And if it's
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1087
1 very bad, it could theoretically be life-threatening or at
2 least contribute to your dying.
3 Q. Let's talk about a plaque about the size of the one
4 that you saw in January of 1995. Would that be
5 life-threatening?
6 A. No.
7 Q. Is that anything that warrants any medical treatment
8 or care?
9 A. No.

10 Q. Would there be any reason for his treating
physicians
11 to spend a lot of time looking for that plaque?
12 A. No.
13 Q. You were asked about the chest x-rays done at Alta
Bates.
14 A. There were x-rays done at Alta Bates.
15 Q. And you were asked that -- whether or not the x-rays
stated there was pleural disease on them.
16 A. Correct.
17 Q. And is there a difference between the ability to
visualize pleural disease on x-rays and CT scans?
18 A. Yes, CT scans are a much more sensitive for
identifying pleural disease.
19 Q. And why is that?
20 A. Because normal, regular chest x-rays are two
dimensional, but people are three dimensional, so the
x-rays
21 collapse all of the shadows on top of one another, and it
22 can be a challenge to pick up abnormalities in the pleura
23 when the shadows are superimposed on top of one another.
24 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1088

1 And unless the -- unless the pleural plaques are very
2 extensive or very heavily calcified or are in certain areas
3 of the chest, you often miss them on regular chest x-rays
4 where you would see them on a CT scan.
5 Q. Are there any studies looking at whether or not
6 individuals who have not been diagnosed with benign
7 asbestos-related diseases on chest x-ray, whether or not
8 they actually have them on autopsy?
9 A. Yes.
10 MR. BRAKE: Objection, Your Honor. That's leading.
11 THE COURT: Don't lead him, please.
12 MS. CHABER: Q. What studies are you familiar with
13 on that issue?
14 A. I can't specifically identify any right now, but I
15 mean, it's well-known that individuals can have plaque at
16 autopsy, and you don't see them on regular chest x-ray.
17 I've seen that myself.
18 Q. Is the same thing true with respect to asbestosis?
19 A. Yes.
20 Q. Does calcification, from whatever source it came
from,
21 go away?
22 A. Calcification doesn't go away.
23 Q. So if Dr. Horowitz had a calcification in January of
24 '95, he'd have one today?
25 A. Right.
26 Q. If you could find the cuts or the part of the CT
scan
27 that shows where the cuts are made in the January, the
April
28 and the June '95 films. You may need some of these down
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1089

1 here. Do you think you have all of them?
2 A. I'm not sure.
3 THE COURT: I think we are going to have to take a
4 brief recess here, if you don't mind.
5 MS. CHABER: Sure. We could get this set up in the

6 break.

7 THE COURT: Please keep in mind the admonitions given
8 to you before each and every time you've taken a recess,
and
9 please return to your seats as soon as you have taken the
10 recess.

11 (Recess taken.)

12 THE COURT: Everybody is present, so you may resumed
13 your examination.

14 MS. CHABER: Thank you, Your Honor.

15 May Dr. Horn step down?

16 THE COURT: Yes.

17 MS. CHABER: Q. Dr. Horn, during the break I asked
18 you to pull out a couple of CT scans. What films do we
have

19 up here?

20 A. These are all cuts through the lower end of the
chest.

21 This was done on January 17th, '95, this was done on April
22 17th, '95 and this was done on June 14th, '95.

23 Q. And are those -- it's the January film that had what
24 you identified as a plaque?

25 A. Yes, you can see calcification on the January film.

26 Q. Okay. By the way, when you first looked at that
film,

27 I see it has a circle around the area you've described?

28 A. Right.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1090

1 Q. Was that circle there?

2 A. That circle was there. I didn't circle it. It --
the

3 circle -- this is a copy, so you can't erase this, so the
4 circle is on the original.

5 Q. And are these cuts in similar areas?

6 A. Various --

7 MR. BRAKE: Objection, leading, Your Honor.

8 THE COURT: Don't lead, please.

9 THE WITNESS: Yes, they are fairly similar. They are
10 slightly different, but they are pretty close. It's very
11 difficult to do it precisely in the same place. When you
12 have people doing this, you have them take a deep breath
and

13 hold their breath as the machine goes around over a few
14 several seconds, and then they breathe and then you have
15 some hold their breath again, and do the next cut and --
16 it's very hard for people to take precisely the same
breath

17 every time so.

18 It's difficult from CAT scan to CAT scan to identify
19 the exact same place on a cut, from exam to exam. It's
very

20 difficult to do because people don't breathe exactly the
21 same, or the disease might change so that they can't
breathe
22 exactly the same way.

23 Q. And are there -- I don't know what they are called.
24 What are the films called that show the x-ray and where
the

25 cuts were actually taken? Does that have a scientific
26 medical name?

27 A. I have no idea.

28 Q. That's what I thought.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1091

1 A. The x-ray with the cuts on them, that's all.

2 Q. Would you pull them out for the respective dates,
3 which is January, April and June?

4 A. Well, I don't have the January one here. I have the
5 April one. So here is the April one and here is the June
6 one. And aside from the fact that it's difficult to line
7 them up, even when you do them every centimeter. Down at
8 the base of the chest they do them every two centimeters.
9 At the top of the chest -- this is the one from April.

10 The cuts are two centimeters apart at the top of the
11 chest. In the middle of chest they are one centimeter
12 apart, and down at the base of the chest they are two
13 centimeters apart.

14 The same thing on the June film, at the top of the
15 chest they are two centimeters apart, and then the lines
get

16 much closer together, then they get farther apart. So the
17 cuts down at the base of the chest don't represent
18 everything that's going on at the base of the chest,
19 particularly when the cut is in this plane and the plaque
is
20 in this plane.

21 So if the plaque were in this plane like so --

22 Q. You're indicating up and down?

23 A. Up and down, and you're cutting through this way,
24 you're much more likely to see it. If it's in this plane,
25 it's much easier to miss. And on the diaphragm, it's on
26 this plane. So the fact that he can't breathe exactly the
27 same one of these is done, and the fact that the cuts are
28 farther apart to reduce his radiation, the reason this was

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1092

1 done, not for the purpose of seeing whether he has plaque,
2 this was done by his clinicians to determine what was the
3 status of his disease and how well he was responding to
4 chemotherapy. So they decreased the number of cuts on top
5 and bottom to reduce his radiation exposure.

6 Q. And on these two x-ray examples of where the cuts
are,

7 can you indicate the approximate area, based on where you
8 saw it in January of '95, where the plaque would be?

9 A. Well, it's somewhere down in here. It's somewhere
10 around cut 37 on the April and again, cut 37, somewhere
11 between 35 and 37 on the June film.

12 Q. And do you believe that that explains why there
would

13 not be able to be -- the plaque would not be able to be
14 visualized in April and June?

15 A. Yes. The cuts are just not complete, and he
probably

16 couldn't hold his breath exactly the same way, Dr.
Horowitz

17 couldn't do it exactly the same way, and the specific area
18 where the plaque is, which is on the same plane as the
19 x-ray, is just missed.

20 Q. Didn't go away?

21 A. Calcification in the diaphragm does not go away.

22 Q. And do you know of any other explanation in

23 Dr. Horowitz for the calcification, other than the
asbestos
24 you indicated?
25 A. No.
26 Q. Thank you.
27 Just a last question or two. Dr. Horn, you
indicated
28 that Dr. Pooley was someone that you were familiar with in
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1093

1 terms of his writings.
2 A. I don't personally know him, but I've read a lot of
3 his writings. I don't know that I've read everything he's
4 written, but I've read a lot of work in which he's a
5 co-author.
6 Q. I want you to assume that Dr. Pooley believes that
7 chrysotile asbestos does not cause mesothelioma. Is that
an
8 opinion that you would agree with with Dr. Pooley?
9 A. No.
10 Q. I want you to assume that Dr. Pooley thinks that
there
11 are high concentrations of crocidolite asbestos in the air
12 in North America. Is that an opinion that you would share
13 with Dr. Pooley?
14 A. He's wrong.
15 MS. CHABER: I don't have anything further, Your
16 Honor.
17 MR. OHLEMEYER: I just have one, Your Honor.
18 RECROSS-EXAMINATION BY MR. OHLEMEYER
19 MR. OHLEMEYER: Q. Have you ever done any research
or
20 conducted an investigation or published an article about
the
21 level of asbestos in the lungs of people who live in North
22 America?
23 A. No.
24 MR. OHLEMEYER: Nothing further, Your Honor. I'd
move
25 Defendants' C, D, E, and F into evidence.
26 THE COURT: Any objection?
27 MS. CHABER: No objection, Your Honor.
28 (Defendants' Exhibit C, D, E, and F received in
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1094

1 evidence.)
2 THE COURT: Any further questions, Mr. Brake?
3 MR. BRAKE: No, Your Honor.
4 THE COURT: Any member of the jury have any
questions?
5 Write the question. Do you want to skip it? All right.
6 Last chance, you know. All right.
7 Thank you very much, Doctor, you may be excused.
8 THE WITNESS: Thank you.
9 THE COURT: Counsel, shall we do the deposition
10 screening now and take the longer lunch period?
11 MS. CHABER: We could do that, or I could start my
12 client.
13 THE COURT: Which do you want to do? It's your
14 preference.
15 MS. CHABER: I think why don't we start.

16 THE COURT: You'd like to start?
17 MS. CHABER: Yes.
18 THE COURT: All right.
19 (Discussion off the record.)
20 MS. CHABER: At this time, Your Honor, I would call
to
21 the stand Dr. Milton J. Horowitz.
22 THE CLERK: Please come forward and raise your right
hand, sir.
23 MILTON J. HOROWITZ,
24 having been called as a witness on behalf of himself, was
25 duly sworn and testified upon his oath as follows:
26 THE CLERK: Please state your name and spell your
name
27 for the record.
28 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1095

1 THE WITNESS: Milton, M-i-l-t-o-n, J, for Joshua,
2 Horowitz, H-o-r-o-w-i-t-z.
3 THE CLERK: Thank you, sir. Please be seated.
4 DIRECT EXAMINATION BY MS. CHABER
5 MS. CHABER: Q. Dr. Horowitz, have you ever been in
court before?
6 A. Yes, when I was about 16.
7 Q. That was awhile ago?
8 A. Awhile ago.
9 Q. How old are you now?
10 A. I am 72.
11 Q. What's your date of birth?
12 A. July 24th, 1923.
13 Q. And where do you live?
14 A. I live in [DELETED].
15 Q. What does your family know you by? Do they call you
16 Milton?
17 A. My friends and close associates call me Mike.
18 Q. Are you married?
19 A. Yes, I am.
20 Q. And to whom are you married?
21 A. Shirley Horowitz.
22 Q. And is that Mrs. Horowitz in the back of the room?
23 A. Yes, she's in the back of the room.
24 Q. And how old is Shirley?
25 A. Shirley is 69.
26 Q. When were you married to Shirley?
27 A. On June 22nd, 1947.
28 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1096

1 Q. And how old was Shirley when you got married?
2 A. 21.
3 Q. And have you been together with her ever since?
4 A. Yes, I have.
5 Q. And how many years have you been married?
6 A. 48.
7 Q. Do you have any children?
8 A. Yes, we do. We have four children.
9 Q. And what are their names and ages?
10 A. Steven, the oldest, is 46; Sherry, then, is 44; Joy
is
11 next, and she's 40; and Peggy is the youngest at 38.
12 Q. Do you have any grandchildren?
13 A. Yes, I have eight grandchildren. Do you want their

14 names?
15 Q. No. I think we will pass on all their names.
16 Can you give me the age range of them?
17 A. They range from 2 to 17.
18 Q. And do you see them with any regularity?
19 A. We have two sets of grandchildren who live in [DELETED],
20 which is adjacent to where we live, so we see them
21 pretty regularly, at least once a week. I have one set of
22 grandchildren, that is two who live up in [DELETED] , outside
of
23 [DELETED]. I see them two or three times a year. And
then
24 one grandchild in [DELETED], and I see him, hopefully,
25 once a year.
26 Q. And do you have a good relationship with your
children
27 and grandchildren?
28 A. I think so; I think so.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1097

1 Q. Can you tell us a little bit about your educational
2 background?
3 A. I went through the public schools in New York City,
4 then graduated from City College of New York in 1943.
5 Q. Did you graduate with any kind of a degree?
6 A. Yes, I got what was called there a BS in SS, a
7 bachelor of science in social science. And then in the
8 Army -- I was drafted into the Army in 1943. I attended
the
9 University of Michigan, the Japanese language school, where
10 the Army was training me to be a Japanese interpreter.

Then

11 I completed their training program and after being
12 discharged from the service, I entered the graduate school
13 at the University of Kansas, where I was awarded the Ph.D.
14 degree in 1952. And also I went through the Meninger
15 Foundation School of Clinical Psychology, which I
completed

16 in June of 1950.

17 Q. What is the Meninger Foundation?
18 A. It is a psychiatric and psychological facility that
19 diagnosis and treats person with mental and emotional
20 disorders, and they conduct research in the areas of
mental

21 health.

22 Q. Okay. And you do not have an M.D. degree?

23 A. No, I do not have an M.D. degree, I have a Ph.D.
24 degree.

25 Q. And your Ph.D. is in what?

26 A. It's in clinical psychology.

27 Q. And when did you receive your Ph.D.?

28 A. I completed the work for it in January of 1952, but
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1098

1 the degree was actually awarded in June of '52 at the
2 graduation exercises at the University of Kansas. They
have

3 only one graduation exercise once a year, so even though
4 some of us completed the program before, we had to wait
5 until June to get the degree.

6 Q. Okay. Did you stay in Kansas at that time after you

7 completed your course work?
8 A. I left Kansas -- we left Kansas in February of '52,
9 where I accepted a job at the university hospitals of
10 Cleveland and Case Western Reserve Medical School. It was
a
11 joint position, both in the university hospitals and the
12 medical school.
13 Q. And when did you move to California?
14 A. Moved to California in August of 1964.
15 Q. Okay. And how long have you lived in California?
16 A. Well, we lived there for 31 years.
17 Q. You've stayed there the entire time?
18 A. Yes, we've been there all the time.
19 Q. Have you been diagnosed with an asbestos-related
20 disease?
21 A. Yes, I've been diagnosed with mesothelioma.
22 Q. And when were you diagnosed?
23 A. The diagnosis was made ultimately in August of 1994.
24 Q. And who was it that told you that what you were
25 diagnosed with was asbestos-related?
26 A. Well, as soon as the diagnosis was made, the
27 physicians who informed me of it and my doctor,
28 Dr. Rosenbloom, told me that, he asked me, "Where have you
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1099
1 been exposed to asbestos?" And then I became aware that
2 this disease was related to asbestos.
3 Q. At the time that Dr. Rosenbloom told you that, could
4 you think of where you'd been exposed to asbestos?
5 A. Oh, I needed to collect my thoughts. I had no clear
6 ideas as to where I might have been exposed to asbestos. I
7 then went over my history and thought of the various places
8 that I had been and began to think about the possibilities.
9 Q. And did you ever serve in the military?
10 A. Yes, I did. I was in the military for
11 three-and-a-half years.
12 Q. What branch of the service was it?
13 A. It was called the military intelligence service.
14 Q. And where did you serve?
15 A. Well, I was -- I began in upper New York, went to
the
16 University of Michigan a year, went to Fort McClellan,
17 Alabama, where I took my officer's training, and then Fort
18 Snelling, Minnesota, and then to Camp Richie, Maryland,
from
19 which I left in October of '45 to go to serve in Japan.
20 Q. And then how long were you in Japan?
21 A. I was in Japan for six months, returned in March of
22 '46.
23 Q. And what were you doing in Japan?
24 A. I was a translator reviewing Japanese documents that
25 the Japanese had secreted, hidden from us during the war,
26 having to do with various technical and scientific
27 materials. And we went around, we had language teams that
28 went around to these facilities and translated them and
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1100
1 wrote the summaries and sent them back to the Library of
2 Congress.
3 Q. And when you came back from Japan, when was that?
4 A. March of 1946.

5 Q. How did you come back?
6 A. I came back by troop ship from a 13-day trip from
7 Yokohama to Seattle.
8 Q. What was the name of that ship?
9 A. The ship was named the Marine Falcon.
10 Q. And what was the condition of the ship?
11 A. It was a ship that had been in another industry
12 besides transporting troops, and it was converted into a
13 troop ship, and the condition was, you know, sort of
14 rundown, but particularly rundown were the sleeping
quarters
15 where the soldiers were sleeping at night.
16 Q. Did you have any job duties or job functions while
you
17 were on board that ship for those 13 days?
18 A. No, we just were told to relax and do whatever we
19 wanted, read, or we played cards or listen to the radio,
20 whatever we could, just to idle the time for 13 days.
21 Q. Did you spend time in the engine room of the ship?
22 A. The engine room?
23 Q. Yes.
24 A. No, I don't think I was in the engine room. I was
in
25 sleeping quarters, which I think were not too far from the
26 engine room.
27 Q. But you yourself didn't go down to the engine room?
28 A. No, no, I wasn't that interested to see what it
looked

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1101
1 like, no.
2 Q. Okay. And was that the only time you were ever on a
3 military-type ship?
4 A. Yes, I believe so. I can't remember any other.
5 Q. When you went over to Japan, how did you get there?
6 A. We flew there from Hamilton Field in California. We
7 flew to the airport outside of Tokyo. Well, we stopped in
8 Guam for a couple of days, we did some work there, and then
9 we went on to Tokyo, but we flew all the way.
10 Q. And since you've been diagnosed in thinking about
11 potential sources of asbestos exposure, have any others
come
12 to mind?
13 A. I thought about the work situation that I was in in
14 Cleveland where I worked in a building that was very close
15 to a new building that was being erected in the years '54
to
16 '56, and I wondered about the possibility of some
17 contamination from the closeness to the site in which this
18 work was done.
19 A five-story building was being built for the new
20 psychiatric department, and so I thought about that as a
21 possibility. And then I also thought when I came to
22 California and worked at the Reiss Davis Child Study
Center,
23 I began there in '64, but in '66 and '67, they were
building
24 a new wing to accommodate very disturbed children, and I
25 wondered about the possibility of having been contaminated
26 in some way by the work that went on in the construction
27 phase of that facility.
28 Q. And did --

1102

1 A. There was one other thing. In 1987, '88, we had some
2 work done at our house where we lived, our home, and the
3 removal of asbestos pipes, ducts, which we were concerned
4 about, because it was that time that there was a lot of
5 publicity about the ill effects of asbestos piping or
ducts,
6 and so we had those removed, and I also thought of that as
a
7 possibility for some effect.

8 Q. Were you home -- first of all, did you do the removal
9 work yourself?

10 A. No, no, no, we employed a company that specialized
in
11 the removal of this work. Oh, yes, and I'm glad you
12 mentioned that, because in Cleveland, we lived in this
13 little house. I wanted to re-do the basement so that the
14 children could play during the difficult winter period,
and
15 so I removed the rough surface of the basement and
replaced
16 it with tiles. And I did that work myself, and that
lasted
17 about a week or so.

18 So I wondered about that possibility that I might
have
19 infected myself through the work that was being done or
20 through the material that I was handling.

21 Q. As you sit here now, are there any other sources of
22 asbestos that you believe may have contributed to your
23 disease?

24 A. Yes, since December, I think it was, when I saw
25 Dr. Horn, we had a lengthy discussion about the
26 possibilities of various sources of infection. He took my
27 smoking history, which was done in great detail, and I
gave
28 him the information about what my smoking history was.
And

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1103

1 then he said to me, did I know that asbestos was in the
2 filters of cigarettes, the filters that I had been smoking,
3 and was that a possibility that I had been infected by the
4 asbestos, so that was the first time I began to think of
the
5 asbestos from a cigarette as being a contaminant.

6 Q. When you smoked Kent cigarettes, and we will come
back
7 to this in detail after the lunch hour, but when you smoked
8 Kent cigarettes, did you know that there was asbestos in
the
9 filter?

10 A. No; oh, no, I did not know that it was asbestos
11 filters. I just knew that this was what they called the
12 Micronite filter, and that it was supposed to be good for
13 our health, and all of that, but I had no knowledge at all
14 that it was asbestos. I didn't know that until December
of
15 1994.

16 Q. Now, Dr. Horowitz, after the service when you got

out,
17 what year was that that you got out?
18 A. '46; October of '46.
19 Q. What did you do when you got out of the service?
20 A. I made preparation to enter the Meninger School of
21 Clinical Psychology. I had interviews, and so forth, and
22 tests, and then was accepted, and began it in February of
23 '47.
24 Q. And what were your goals at that time?
25 A. My goals were to become a psychologist and to do
what
26 I could do in relation to the work that psychologists did.
27 Q. Okay. And you were in school from '47 to '52?
28 A. '52, yes.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1104
1 Q. Did anything -- how did you get to Cleveland? How
did
2 that come about?
3 A. The director of the department of psychiatry in
4 Cleveland wrote to the director of my facility in Topeka,
5 where I was being trained, and asked if they had any bright
6 young men or women who would fit the bill to take a
7 challenging job in Cleveland, and so the director of our
8 program recommended me. And I was interviewed, then, in
9 October of '51 and was given the job, and which I began in
10 February of '52.
11 Q. And you moved there in February of '52 to Cleveland?
12 A. I moved to Cleveland; however, I went to New York
13 first to leave my wife and two children at that time in
New
14 York, because we had no place to live in Cleveland.
15 Q. And why in New York?
16 A. Well, our families lived there, and Shirley's mother
17 was able to accommodate her and the children during that
18 time.
19 Q. At that time, how many children?
20 A. We had two children at that time. And so we needed
a
21 place to live.
22 Meanwhile, I took a room in Cleveland to get started
23 on the job, and also to start looking for housing. And
24 finally, when I found a house, I called Shirley up, and we
25 spent a weekend together and we accepted that house, or we
26 offered and our offer was accepted for that house, and we
--
27 she moved in sometime in March or April. I'm not sure
when
28 she moved there. Meanwhile, I had to live by myself in
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1105
1 Cleveland for that month or so.
2 Q. And when you took the job in Cleveland, what was that
3 job that you were taking?
4 A. It was a dual appointment. I was an instructor in
5 psychology at the medical school and also a psychologist,
6 senior instructor in psychology at the university hospitals
7 of Cleveland. And my job, basically, was to work in
8 diagnosis of patients who came to the hospital and also to
9 help in the treatment programs that were going on.
10 Q. And how long did you remain at the university

11 hospitals in Cleveland?
12 A. I remained there until '64, when we moved to
13 California, with the exception of one year, 1961 to '62,
14 when I was on sabbatical at the University of California
at
15 Berkeley. I had a year provided for me by the
Commonwealth
16 Fund in New York. They paid my way, and I spent a year at
17 Berkeley doing research on higher education.
18 Q. What were you doing?
19 A. I was writing an article for the Journal of Medical
20 Education at that time, and I was interested in graduate
and
21 professional education. I found a place in Berkeley where
I
22 could also participate with them in their studies on
higher
23 education, so I traveled with the team of investigators
24 around the country to different college settings where
25 research was going on in higher education.
26 I found that interesting. And simultaneously, I
wrote
27 about higher education, nonmedical professional education
28 for the Journal of Medical Education, so it was an
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1106
1 interesting time.
2 Q. And when the sabbatical was over in 1962?
3 A. I went back to Cleveland, yes.
4 Q. And then from there, the following year you went to
5 California?
6 A. I went to -- yes, we began -- the director of the
7 child study program, Reiss Davis Child Study Center had
8 heard about my interest in education and work with
children,
9 and so forth, and asked me if I'd be interested as a job
10 there in director of professional education. And after
11 having spent a year in California, I realized that I much
12 preferred to live there than to live in Cleveland. It was
13 pretty dark and difficult in the winter months.
14 Q. So you didn't like the winters in Cleveland?
15 A. No.
16 Q. And you moved to California?
17 A. Moved to California.
18 Q. Okay. And the job at the Reiss Davis Child Study
19 Center, what was your title?
20 A. I was the director of professional education, but it
21 was also a place in which I could see my career developing
22 in the area of working with children. I was very
interested
23 in working with this sort of children. I had some
24 experience with children, I had done my doctoral studies
on
25 children, but this place specialized in treating psychotic
26 children, or very disturbed children, so I took on some of
27 these kids and got good supervision with them, and I
thought
28 it was a good tradeoff.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1107
1 I did the professional education work, but I also was

2 extending my own career in that area. And I began also to
3 do some private work, because the salary in places like
that
4 isn't very great, so I needed to supplement my income, so I
5 was a very busy guy beginning in 1964.
6 Q. And how long did you remain at Reiss Davis?
7 A. Until '69. I stayed there for five years, and then
8 branched off into full time private work, although I
9 continued my connection with Reiss Davis, but I also began
10 another very important step in my life, and having to do
11 with entering or beginning a connection with a
12 psychoanalytic institute.
13 Q. What's that?
14 A. That's the Los Angeles Institute for Psychoanalytic
15 Studies, which is a facility that trains people to become
16 psychoanalysts. I was very interested in that, and began
to
17 associate with these people, to do research with them, to
18 teach with them and to write with them. And so I then
began
19 my career in private work, and also working -- this became
20 my major academic type of setting that I worked at.
21 Q. Was that the institute?
22 A. At this institute, yes.
23 Q. And have you remained active with the institute?
24 A. Oh, very much so. I've been the head of committees,
25 I've been the president, I've been the dean of the
26 institute, a lot of things over these last 23 years or
27 something, 24 years.
28 Q. Before you were diagnosed with the mesothelioma, did
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1108

1 you do any training of people studying to be
psychoanalysts?
2 A. Oh, yes, I am a psychoanalyst, and I have -- I had
3 people in analysis who were training to be psychoanalysts.
4 I also did supervision of people who were treating other
5 people, but needed supervision while they were working. So
6 both as a supervisor and as an analyst and a teacher,
7 because I taught courses every year. We were required to
8 teach at least one or two courses, so that was my principal
9 academic activity during this period.
10 Q. And before you were diagnosed with the mesothelioma,
11 how frequently were you working in your private practice?
12 A. Oh, I worked in my private practice every day. I
was,
13 in the years -- I was averaging around 30, 35 hours of
work
14 a week, and then on top of that, I did supervision and
15 analysis, so, you know, it was a busy time.
16 MS. CHABER: Your Honor, this might be a good time.
17 Are we taking a lunch break?
18 THE COURT: All right. That's a good idea. I was
19 fascinated with his stories, so got lost in the time.
20 We will take the noon recess at this time, ladies
and
21 gentlemen, until 1:30. Please keep in mind the
admonitions
22 given to you before, that you are not to form an opinion
23 about the case, you are not to make any inquiry about it,
24 you are not to talk about it amongst yourselves or with
25 anyone else. If anyone attempts to talk to you about it,

26 please advise the Court of that fact. Return at 1:30,
27 please.

28 (In open court outside the presence of the
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1109
1 jury.)
2 THE COURT: I have a love note from one of the
jurors.

3 This is what it asks: Why is this case conducted in San
4 Francisco when the plaintiff lives in [DELETED] and the
5 defendants are from the Midwest and the East Coast?

6 MR. OHLEMAYER: Does California have statewide venue.

7 MS. CHABER: Yes, we have statewide venue.

8 MR. BRAKE: But the venue is a function of --

9 MS. CHABER: There was no motion for change of venue.
10 California has statewide venue.

11 MR. BRAKE: Without regard to other venues proper,

the
12 reason this case is here was at the time it was filed was
13 there were other defendants whose principal places of
14 business or whose connection to San Francisco was
15 sufficient. If she filed a case against us alone, it
16 wouldn't be.

17 MS. CHABER: I understand, but that's a legal issue
18 that is not of consequence to the jury, nor should the

jury
19 opine on those questions as to whether you being the only
20 defendants in here, we would have been somewhere else.

21 That's not where we are now, and it's perfectly proper
that

22 we are here. This was a proper place to file.

23 THE COURT: That's a good question, and I think we
24 will have to give them a vague and uncertain answer and

tell
25 them not to worry about it, it doesn't make any
difference.

26 There's several different places that could have brought
the

27 case and it was brought here and here we are. That's all
28 that matters. Is Mrs. Horowitz going to testify?

 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1110
1 MS. CHABER: Yes, she is, though I don't know if
2 that's going to be today. It depends.

3 THE COURT: Then we are going to reserve for some
4 other time to screen these depositions. They are not going
5 to be given today or tomorrow; is that right? They are not
6 going to be read to the jury?

7 MR. OHLEMAYER: Not today.

8 MS. CHABER: Well, I didn't anticipate reading them
9 today. I was hoping we could get through them at some
point

10 today and be read.

11 THE COURT: I don't know how much longer they will
12 take, but I'm trying to figure it out, because if we are
13 going to take them today, then we probably are going to
have

14 to terminate testimony early.

15 MS. CHABER: I don't want to do that, either. I
16 prefer to do the live witnesses when the live witnesses
are

17 available.

18 THE COURT: We will do that some other time.

19 MS. CHABER: And we will fill in the depositions at
20 another point.

21 (Lunch recess taken.)

22 (In open court in the presence of the jury.)

23 THE COURT: Good afternoon, everybody. All of the
24 jurors and counsel and witnesses are present, so we may
25 proceed, please. Ms. Chaber.

26 MS. CHABER: All right.

27 Q. Dr. Horowitz, have you ever been a smoker?

28 A. Oh, yes.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1111

1 Q. When did you begin smoking?

2 A. I began smoking in the military service in 1944.

3 Q. How did you start?

4 A. The various cigarette companies distributed samples
of cigarettes to the soldiers, and so I got my first pack of
5 cigarettes from Old Gold cigarettes.

6 Q. And how much did you smoke when you first started?

7 A. Relatively mild. About a half a pack a day, and then
8 I gradually increased to about a pack or less a day. I
9 never really went over a pack a day.

10 Q. And when you began, you said you started out with
Old
11 Golds?

12 A. Yes.

13 Q. Were those filter or nonfilter cigarettes?

14 A. They were nonfilter.

15 Q. And did you only smoke Old Golds?

16 A. During that period in the military, I tried
different

17 kinds. We had Lucky Strikes, we had Chesterfields, we had
18 three kinds, basically, but during the military I smoked
19 mostly Old Golds and Chesterfields.

20 Q. And when then -- were any of those filtered
21 cigarettes?

22 A. No, they were not filtered.

23 Q. When you got out of the military, what did you smoke
24 then?

25 A. I smoked Chesterfields beginning in 1946 when I got
26 out of the military. I stayed with Chesterfields until I
27 switched to Kent filters in 1952.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1112

1 Q. And besides Kent filters, did you ever smoke any
other

2 filter cigarette?

3 A. I tried once with a friend to smoke a Marlboro
filter.

4 I once smoked a Kool, but that was about all. I stayed
with
5 Kent.

6 Q. And when did you begin smoking Kent cigarettes?

7 A. Very clearly in the spring of 1952. I remember that
8 clearly, because 1952 was a very important time in my life,
9 as I mentioned earlier. I had completed my studies in
10 Kansas, I moved to Cleveland for my first real job. We
11 moved our family, and I settled into a job, and with new

12 friends and new setting, and also began smoking a new
13 cigarette.
14 Q. And why did you start to smoke Kents?
15 A. Well, at the time, I think Kent was introduced
16 somewhere in February or March of 1952, the Kent filters,
17 and it was accompanied by great advertising that suggested
18 that it was safe, it was good for one's health, it was
more
19 successful than other cigarettes in filtering out tars and
20 nicotines, and also the friends that I had made, one of
the
21 doctors at the university hospital, they also seemed to be
22 convinced that Kents were the cigarette to smoke, so I
went
23 along with that.
24 Q. What do you recall about the advertising for Kent?
25 A. I saw lots of advertising in different publications.
26 They were both in medical journals and in the regular
press,
27 like Look magazine, Life magazine, Saturday Evening Post,
28 and then The Journal of the American Medical Association.
I

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1113
1 think even The New England Journal of Medicine had ads,
very
2 favorable ads for Kents.
3 Q. What did seeing an ad in a medical journal do for you
4 with respect to your thoughts about the cigarette?
5 A. It just added to what I had heard informally about
the
6 safety and health saving aspects of that filter, and so I
7 felt encouraged to go on with that.
8 Q. What do you recall about the representations made
9 about Kent in their advertising?
10 A. That they filtered -- particularly the filters, you
11 see, that the filters filtered out unhealthy aspects of
the
12 smoke; that they reduced tars and nicotines; that they
were
13 the most effective, healthful cigarette that was available
14 at that time.
15 Q. And what do you recall about the filter at the time
16 that you first started smoking Kents?
17 A. I recall mostly about that filter, the color of it.
18 It was a very emotional thing in some strange way because
my
19 father had died four months prior to that, and my father
had
20 beautiful blue eyes, and the filter of Kents was exactly
the
21 same color as my father's eyes, and that stuck with me so
22 strongly, that I never was able to forget that.
23 MS. CHABER: May I confer with counsel for a moment,
24 Your Honor?
25 THE COURT: Certainly.
26 (Discussion off the record.)
27 MS. CHABER: Your Honor, I have a series of
28 photographs I'd like to have marked as Plaintiffs' next in
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1114

1 order.

2 THE CLERK: Plaintiffs' Exhibits 30 through 36 marked
3 for identification.

4 (Plaintiffs' Exhibits 30 through 36 marked for
5 identification.)

6 MS. CHABER: Q. Dr. Horowitz, I'm handing you
7 Plaintiffs' Exhibit 32 and ask you if you recognize that
8 photograph.

9 A. Yes, this looks exactly like a package of Kents with
10 that blue Micronite filter that I began to know in 1952.

11 Q. And handing you Exhibit 30, can you tell us what
that

12 looks like?

13 A. That also looks like the same thing. That's looking
14 down on the blue filter tip cigarettes of Kents in 1952.

It

15 had a distinctly porous appearance. It was not smooth

like

16 some of the current filters are. There were like holes,
17 pock marks in between.

18 MS. CHABER: I'd like to display them to the jury.

19 THE COURT: All right.

20 MR. OHLEMAYER: Are they being offered, Your Honor?

21 THE COURT: No. I don't know. They haven't been
22 offered yet.

23 MR. OHLEMAYER: Are you going to offer them into
24 evidence?

25 MS. CHABER: I will, subject to the discussion that
26 you and I just had off the record, which I thought we were
27 going to work out subsequent to this.

28 MR. OHLEMAYER: It's a procedural point, Your Honor.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1115

1 If she offers them into evidence, I have no objection.

2 MS. CHABER: I would offer them into evidence, and

I'm

3 seeking to have color xeroxes substituted for them at a
4 later point in time.

5 THE COURT: That's fine. All right. They may be
6 admitted.

7 (Plaintiffs' Exhibits 30 & 32 received in evidence.)

8 MS. CHABER: Q. Dr. Horowitz, at the time you met
9 with Dr. Horn and discussed your smoking history with him

--

10 do you recall that time?

11 A. Yes, I remember that.

12 Q. Had you seen these photographs at that time?

13 A. No, I had not seen these photographs.

14 Q. And at the time of your deposition in April when you
15 were asked questions about your smoking history, had you
16 seen those photographs at that time?

17 A. No, I had not seen them in April.

tell

18 Q. I'm handing you Plaintiffs' Exhibit 33. Can you

tell

19 us what that is?

20 A. This is a picture of what the Kent filtered

cigarette

21 looked like, package looked like when it first came out.

22 This was replaced a couple years later by a king size

23 package, but this was the regular package of Kent

24 cigarettes.

25 Q. Did you smoke the regular cigarettes?

26 A. Well, the filtered cigarettes.
27 Q. They were filters?
28 A. Yes, this is what we are talking about, filters,
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1116
1 because I never smoked Kent -- I don't know if Kent had any
2 nonfiltered cigarettes. I don't know that.
3 Q. You didn't smoke them?
4 A. No, no, in no case did I ever smoke a nonfilter from
5 Kent, right.
6 Q. When you first started to smoke Kents in 1952, what
7 package did you smoke from? What was the type, was it a
8 king size?
9 A. No, it was not king size, it was regular size, such
as
10 this represents. This is a photograph of a regular size
11 filter tip cigarette package.
12 Q. And is that what you started out smoking?
13 A. Yes, I started out smoking that.
14 Q. And I'm handing you Plaintiffs' 34. Can you tell us
15 what is that is?
16 A. That's -- that's the back of the package of Kent
17 cigarettes, and it has on it what I said before concerning
18 the advertising claims of the Kent manufacturer.
19 Q. Handing you Plaintiffs' Exhibit 35, ask you if you
20 recognize that?
21 A. Yes, I recognize that. This now is a picture of a
22 king size package of filter cigarettes by Kent.
23 Q. Did you ever smoke the king size?
24 A. Oh, yes, I did. When they went into king size in
25 1954, I believe, I continued with them, except that I used
26 the king size then.
27 Q. And handing you Plaintiffs' 36, do you recognize
that?
28 A. Yes, I recognize that.
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1117
1 Q. And what is that?
2 A. That's a picture of a Kent cigarette with a Micronite
3 filter.
4 MS. CHABER: May I show these to the jury, Your
Honor?
5 THE COURT: Yes. You're offering them?
6 MS. CHABER: Yes.
7 MR. OHLEMAYER: No objection, Your Honor, with the
8 same proviso.
9 THE COURT: Yes.
10 (Plaintiffs' Exhibits 31, 33, 34, 35, & 36 received
in
11 evidence.)
12 MS. CHABER: Q. Dr. Horowitz, when you went to see
Dr. Horn, was that at my office's request?
13 A. Yes.
14 Q. How long did Dr. Horn spend with you?
15 A. Between two and three hours.
16 Q. What kinds of things did he do?
17 A. Well, he first had me fill out a lengthy
questionnaire
18 about my medical history. Then he went into my medical
history in great detail. And while he was asking me
19 questions, he was also dictating the answers as he was
20
21

going

22 forth and making his record of what we were talking about.
23 He also then asked me in detail about my smoking history,
24 something that no other doctor had previously done.
25 And then he examined me -- but before that, I should
26 say one of his technical assistants gave me a series of
lung
27 tests to see what my abilities were, in terms of breathing
28 in and blowing out and holding air and all of that. That
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1118

1 took almost an hour, too. So that should increase the
time.

2 I was there about four hours altogether.

3 Q. Did you have x-rays done, as well?

4 A. Yes, I'm sorry, I forgot that. Yes, we had chest
5 x-rays taken as well, right.

6 Q. In the form that you filled out, I think defense has
7 already marked that as Defense F, I believe. Is this the
8 form?

9 A. Yes, that looks familiar.

10 Q. Were there questions asked about smoking on that?

11 A. On this form?

12 Q. Yes.

13 A. Yes, there are questions about that.

14 Q. And what questions were asked about smoking?

15 A. Well, do I smoke or did I smoke cigarettes.

16 Q. What was your answer?

17 A. Yes. Question: Did I smoke cigars or pipe? My
18 answer was no. Do I presently smoke? The answer was no.
19 How many packs per day? I left that blank. At what age
did

20 you start smoking? 1944.

21 Q. Does it say what age?

22 A. At what age or year did you start smoking, yes. At
what age or year did you quit smoking? I wrote 1963.

24 Q. When did you quit smoking?

25 A. New Years' weekend 1963.

26 Q. And how did it come about that you quit smoking?

27 A. Well, it began when I was in Berkeley in the year
of.

28 '61 to '62 when there was an awful lot of talk about the
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1119

1 hazards of smoking, but it was not really until I began to
2 feel some of the unpleasant side effects of smoking, like
3 I'd feel congested or like I had to clear my throat when I
4 woke up in the morning. And I began to take this all
5 seriously. And New Years' weekend '63, I decided I was
6 going to stop and that was it.

7 Q. How easy was it to quit smoking?

8 A. It wasn't so easy. I went through the usual problem
9 of what to do instead of smoking. I tried life savers, I
10 tried gum, I tried drinking water, I tried doing exercise.
11 It took about three or four months before I got on top of
12 it.

13 Q. And in the course of your work as a psychologist,

You

14 have occasion to deal with people who have addictions?

15 A. Yes.

16 MR. OHLEMAYER: Objection, Your Honor, relevance.

17 THE COURT: Sustained.
18 MS. CHABER: Q. Knowing what you know about
19 psychology, do you have an opinion as to whether or not
you
20 were addicted to smoking?
21 MR. OHLEMEYER: Same objection.
22 THE COURT: Sustained.
23 MS. CHABER: Q. When you first started smoking the
24 Kent cigarettes in 1952 -- strike that. Let me ask you
some
25 other questions.
26 When you finished smoking a cigarette, did you do
27 anything to it besides putting it out?
28 A. Back in the days when I was in the Army, they taught
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1120
1 us to strip a cigarette. That is, to take the paper off
the
2 tip of the cigarette so that the tobacco would come out.
3 This was intended to prevent fires. That is, butts of
4 cigarettes to start fires, so that this habit persisted
with
5 me for some time.

6 And occasionally when I finished a filter tip, I got
7 to be very interested in the feel of that filter, and I
8 stripped it down and sort of played with this porous blue
9 filter for a bit before I discarded it.

10 Q. And was that something that you were doing
11 intentionally to find out what was in the filter?

12 MR. OHLEMEYER: Objection, Your Honor, leading.

13 THE COURT: Restate the question.

14 MS. CHABER: Q. Were you doing that intentionally,
or
15 were you doing that in some other unconscious way?

16 MR. OHLEMEYER: Same objection.

17 THE COURT: Don't suggest the answer. Just ask him
why.

18 MS. CHABER: Q. Why did you do that?

19 A. Well, partly out of habit. It was unconscious. But
I
20 was also very curious to study the filter itself, I mean
21 what it looked like, what it felt like. It was different.
22 Q. Did you know what it was made out of?

23 A. No. It felt somewhere between paper and cotton. It
24 had a nice soft feel to it, but the feel was not
25 consistent.

26 There were parts of it that were rougher than others. And
27 not always were the cigarettes the same in feel. That
made
28 me feel very curious about them.

 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1121
1 Q. Did you go and do any kind of scientific analysis of
2 what was in them?
3 A. No, I didn't do that, no.
4 Q. Did you ever read any articles about Kent filter
5 cigarettes or any other filter cigarettes?
6 A. No, I did not. That is not only very recently. But
7 in all the years that I was smoking, I did not.
8 Q. And when you met with Dr. Horn and gave him your
9 smoking history, did Dr. Horn suggest any answers to you?

10 A. Well, Dr. Horn made it very clear that the filter of
11 the Kent cigarette, the years that I was smoking it,
12 contained asbestos, and that in his opinion, there was a
13 relationship between that smoking or that asbestos and
14 mesothelioma, with which I was diagnosed.

15 Q. At what point in time did Dr. Horn make that clear
to
16 you, before or after you gave a smoking history?

17 A. It was after. It was after. Because I had given
much
18 of that here and I talked to him about it, and then he
asked

19 me what did I know about Kent cigarettes, and I told him I
20 knew nothing, except I described to him what those filters
21 looked like, et cetera, and then he brought up the
22 connection between the asbestos and mesothelioma.

23 Q. When you were giving the smoking history and that
24 information, did Dr. Horn suggest anything to you about
25 years that you might have smoked those cigarettes?

26 A. The years?

27 Q. Yes, when you were giving him the smoking history
and
28 he was asking you questions about your smoking, did Dr.
Horn

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1122
1 make any suggestions to you about what years you had smoked
2 cigarettes?

3 A. No, he did not make any suggestion to me. I was the
4 one who told him when I smoked them, and I was the one who
5 told him what the filter looked like as part of his getting
6 the history from me. I told him about this blue filter, I
7 remember that it was a blue Micronite filter, and I told
him

8 about my experiences with it. He did not suggest any of
9 that to me. The link was that he told me that it contained
10 asbestos, which I did not know.

11 Q. And that was after you'd given him this history?

12 A. Yes, I spontaneously and voluntarily gave him the
13 other information, and then he added the part about the
14 asbestos.

15 Q. And was that something you had known before you had
16 gone to see Dr. Horn?

17 A. No, I did not know that. I did not know that.

18 Q. Now, you had gone to see Dr. Horn because you had
19 filed a lawsuit for asbestos; correct?

20 A. That is correct.

21 Q. And at the time that you went to see Dr. Horn, were
22 these defendants, Lorillard and Hollingsworth and Vose,
part

23 of that lawsuit?

24 A. No, not when I went to see Dr. Horn. They were
added

25 afterwards.

26 Q. Now, the filter that you described to Dr. Horn and
27 that we've just looked at the picture of, did that filter
28 change?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1123
1 A. Change over time?
2 Q. Did it ever change?

3 A. Oh, yes, it changed. It changed somewhere in 1956 or
4 '57. I approximated about four or five years of my using
5 it, it became white. It no longer was a blue filter. It
6 began to be called a Micronite filter, the same name, but a
7 different type of filter, not blue anymore.

8 Q. Do you recall whether or not it still had, even
though

9 the color had changed, whether it had the same appearance
as
10 shown in Plaintiffs' 31?

11 A. Well, you know, I can't answer that clearly. The
12 color of it having turned white afterwards, when I looked
at
13 the filter in opening a pack, I could not see very
clearly,

14 and I was not as aware of the differences in the way the
15 filter looked, just I was aware of the difference, clear
16 differences in the color.

17 Q. Was there any change at all in the porousness of the
18 filter?

19 A. I don't recall that. I don't recall that.

20 Q. When you lived in Cleveland during the time period
21 that you were smoking Kent filter cigarettes, did you
22 participate in a poker game?

23 A. Yes, I did. I played poker about once every couple
of
24 weeks.

25 Q. And are any of the people that you played poker with
26 still alive?

27 A. There are two that I know who are still alive, yes.

28 Q. And who are they?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1124

1 A. Dr. Elliott Foxman is one and Mr. Fred Schleffler is
2 another.

3 Q. And how do you know Dr. Foxman?

4 A. I knew Dr. Foxman first in my days in Topeka. He's a
5 psychiatrist. He was in training to be a psychiatrist.
6 Then he left -- no, I left Topeka in February of 1952. He
7 then went into the service later in 1952, and low and
8 behold, and sometime late '54 he reappears out of the
9 service in Cleveland, and I got to know that, because his
10 wife met my wife at someplace, and we reestablished our
11 friendship. And we've been friends of since.

12 Q. And what year was that that you reestablished your
13 friendship?

14 A. It was probably in early '55 or -- well, maybe late
15 '54.

16 Q. And you remained friends?

17 A. Oh, yes, we've remained friends ever since.

18 Q. And did he -- you moved to California in 19 --

19 A. I moved to California in '64.

20 Q. Did Dr. Foxman remain in Cleveland?

21 A. No, he preceded us in moving to California. He was
in
22 Los Angeles before we got there.

23 Q. And then did you meet up with him again in Los
24 Angeles?

25 A. Yes, we met up again in Los Angeles, right.

26 Q. And how is Dr. Foxman's health at present?

27 MR. OHLEMEYER: Objection, Your Honor, relevance.

28 THE COURT: Sustained.

1125

1 MS. CHABER: It's foundational, Your Honor, to
2 unavailability.

3 THE COURT: All right.

4 MR. OHLEMAYER: Your Honor, that's not a matter --

5 MR. BRAKE: Not for the jury in any event.

6 THE COURT: It's not relevant.

7 MS. CHABER: Q. Had you asked Dr. Foxman to come up
8 here to testify?

9 MR. OHLEMAYER: Objection, Your Honor, relevance.

10 THE COURT: Sustained. We can take that up outside
11 the presence of the jury if there's a problem about it.

12 MS. CHABER: Okay. Did Dr. Foxman smoke?

13 A. Yes, he smoked.

14 Q. He was in this poker game with you in Cleveland?

15 A. Yes, he was with me when he came back to -- when we
16 met again in Cleveland in '54, '55.

17 Q. And were the poker games ever at your house?

18 A. Oh, yes, they were at my house most of the time.

19 Q. And when the poker games were at your house, who
20 provided the cigarettes?

21 A. Well, I would have a pack of Kents around, and he
22 would smoke them, or the others occasionally would smoke
23 some, too.

24 Q. Did Dr. Foxman always bring his own cigarettes to
the
25 game?

26 MR. OHLEMAYER: Objection, Your Honor, relevance.

27 THE COURT: I don't see the relevance.

28 MS. CHABER: It's foundational to offers from

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1126

1 Dr. Foxman, Your Honor.

2 THE COURT: Okay, well, do that with Foxman.

3 MS. CHABER: I can't do that with Foxman. That's the
4 problem.

5 MR. BRAKE: Can we go to sidebar, maybe, and sort
this
6 out?

7 THE COURT: Go ahead and ask the witness questions.

8 We are not talking about Foxman here and now.

9 MS. CHABER: Q. Did Dr. Foxman ever borrow or bum
10 cigarettes from you?

11 A. Yes, he did.

12 Q. And what were the only cigarettes that you smoked
from

13 the time that you re-met Dr. Foxman in 1954 --

14 A. Well, Kents were the only cigarettes that I ever
15 smoked, really, in that period.

16 Q. Did what your friends were smoking, was that
something

17 you paid attention to?

18 A. Sometimes.

19 MR. BRAKE: Leading.

20 THE WITNESS: I was aware that they smoked different
21 cigarettes, but that wasn't a big issue.

22 MS. CHABER: Q. Who bought the cigarettes in your
23 house?

24 A. Generally my wife did when she went shopping.

25 Q. Did Shirley smoke?

26 A. Yes, she smoked Kents, too.
27 Q. And do you know what the price of a pack of Kent
28 cigarettes was in 1954?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1127

1 A. I never paid attention to it. I don't know. I don't
2 know whether they were cheaper or dearer than other
3 cigarettes. I don't know.

4 Q. Were there any television shows that you watched in
5 the 1950s?

6 A. A lot of them. Mostly through the kinds of shows our
7 kids liked to watch, but I watched them, too.

8 Q. And I don't want to ask a leading question, Your
9 Honor, but we could be here for a while.

10 Can you name some of the shows that you watched in
the

11 1950s?

12 A. Oh, Father Knows Best, Milton Berle, \$64,000
question,

13 Roy Rogers, Mickey Mouse.

14 Q. Some of your kids were young?

15 A. Yes.

16 Q. At the time that you read them, can you tell us
17 whether or not you believe the ads that Kents were safer
18 than other cigarettes?

19 A. I believed it. I believed what it said on the
20 package.

21 Q. At the time that you were smoking Kent cigarettes
with

22 the blue filter, did you know that asbestos was hazardous
to

23 health?

24 A. I did not know hazardous -- asbestos was hazardous
to
25 health, and I certainly didn't know that it was contained
in

26 the cigarette filter.

27 Q. When did you first learn of the hazards of asbestos?

28 A. In about 1985, when I began to read about people
being

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1128

1 concerned about asbestos pipes in their homes and needing
to
2 remove them, and people coming down with illnesses
3 associated with asbestos.

4 Q. In the 1950s, do you recall what magazines you were
5 reading, either at home or at work?

6 A. Well, there were the popular magazines like Look and
7 Life, and sometimes we read the Saturday Evening Post.

Then

8 I read a lot of professional journals. I think Time, also,
9 was out at that time. Yeah, I think.

10 Q. Now, besides asbestos from Kent filter cigarettes,
you

11 told us that there were some other ways that you think you
12 might have been exposed. I want to talk to you about

Hanna

13 Pavillion.

14 A. Yes.

15 Q. Now, where was Hanna Pavillion located?

16 A. It was located in a section of Cleveland which was
17 part of the university hospitals group. It was built in
the
18 years 1954 to '56, and it was located about 100 feet or so
19 away from the office that I occupied in those years.

20 Q. And what kind of work was being done at that
21 pavillion?

22 A. Construction work. They dug a hole in the ground,
23 they started to build a building. They began the building
24 from the ground on up, and it was a five-story building,
25 included a very extensive laboratory for animals in the
26 basement where experiments were done. We had inpatient
27 hospital facilities, we had outpatient clinics, we had
28 offices. It was a major structure.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1129

1 Q. And did you, besides having your office located
2 nearby, did you ever go on the construction site itself?

3 A. Oh, yes, while the building was being built, the
4 director of our department was a man named Douglas Barne,
5 who was very proud of having gotten the funds for the
6 building of this building and what it would mean to the
7 growth of psychiatry in the area, and he encouraged us to
8 share that pride by periodic visits to see how this
building

9 was going on as it was being developed.

10 Q. And at the time that you went on, were there workers
11 that were doing construction work?

12 A. Yes, there were people working. I began by
observing

13 the workers putting up the steel girders and spraying the
14 steel girders with various materials. Then, as the
building

15 began to shape up, we began to make visits to it to see
what

16 it was like. And except for being warned every so often
not
17 to get too close to the workers themselves, we were not
kept

18 from visiting.

19 Q. Do you know what materials or what was contained
20 within the materials that these workers were working with?

21 A. I don't know exactly. I saw all kinds of bags and
22 boxes and things and being blown into the building and
blown

23 on the girders, but I never really paid attention to what
24 the content was of the material.

25 Q. And you also said that you were around a
construction

26 site at Reiss Davis?

27 A. Yes, but not as much as I was at the Hanna
Pavillion,

28 because at Reiss Davis the wing that was being put on was

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1130

1 sort of around the back to where my office was located, so
2 my greatest exposure to that was when I would go to the
3 parking lot to -- before or after work, and I would be
close

4 to what they were doing.

5 Q. Do you know what any of the materials that were being

6 used there were?
7 A. The usual, you know, building materials, steel and
8 stone and cement and aluminum and plaster and all kinds of
9 things. I suppose there was also a lot of asbestos being
10 blown in and put on and so forth.
11 Q. Do you know that?
12 A. I know that from having talked to the director of
the
13 building and his knowledge of all the people who worked
14 there, yes. I talked to him after it was all done and he
15 knew exactly what was being done.
16 Q. Now, Dr. Horowitz, let me ask you if you'd ever been
17 diagnosed with cancer before you were diagnosed with
18 mesothelioma?
19 A. Yes, I had been diagnosed with cancer two other
times
20 in my life. When I was 47, I had cancer of the bowel,
which
21 was removed surgically.
22 Q. And what year was that?
23 A. That was in 1971. April. And the results were
good,
24 I never had any sequelae, and I've had periodic
25 colonoscopies done to see if any polyps were developing
and
26 if any polyps were, they were removed, and I've never had
27 any trouble with my bowels since 1971.
28 Q. Have you had any recurrence of the colon cancer
since

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1131
1 the surgery?
2 A. No, no recurrences. Then in 1987, I had a
3 prostatectomy, which was a surgical removal of my prostate,
4 which was cancerous.
5 Q. And what were you told you had?
6 A. I was told I had adenocarcinoma of the prostate.
7 Q. Was there any question at that time as to whether or
8 not it had metastasized or spread to any other places?
9 A. At the time of the surgery, the surgeon removed 14
10 lymph nodes, which ran up and down my abdominal area, and
11 after the surgery was completed, one of these lymph nodes
12 showed microscopic metastasis. It was found through
13 microscopic examination of the tissue. That's how we knew
14 that there was one and that was metastasized.
15 Q. And what were you advised to do from that point on?
16 A. Well, I was advised to sit tight and see what
17 developed. I took regular PSA tests, which were zero, and
18 then three years later, there began to be an elevation of
19 the PSA.
20 Q. Which is what?
21 A. It's the prostate specific antigen, PSA, which
22 represents the amount of prostate that's liberated through
23 the activity of testosterone in the system. And at the
time
24 that it read 13, my urologist, who had taken care of me at
25 that time, suggested that we consider hormone therapy,
26 consider it. I decided, in consultation with my
internist,
27 that at this stage of the game it would be better if I
were
28 under the care of an oncologist rather than a surgeon.

1132

1 Q. And why did you decide that?
2 A. Because they thought that this was now a systemic
3 disease, it was not a disease that required surgical
4 intervention, it was something that would require care and
5 thoughtfulness from someone who was a cancer expert rather
6 than someone who was a surgeon.

7 So I did that, and went to Dr. Barry Rosenbloom in
8 late 1990, which was over three years after my original
9 surgery. And after various examinations, consultations, we
10 decided to let it run, let's see what happened. I was
11 feeling well clinically. My weight was level, I was
active

12 and working and so forth.

13 Q. Let me stop you there for one second. Had you lost
14 some time from work as a result of the prostate cancer?

15 A. Not a great deal. I was out of work for three weeks
16 after the surgery and occasionally I needed time to go to
17 see doctors, but I was able to maintain a fairly good
18 schedule of work. It was not noticeably affecting my
19 workload.

20 Q. And did you return to full-time work at some point
21 after that?

22 A. Oh, yes, I worked -- within a month after the
surgery,

23 I was back to full-time work.

24 Q. And so what happened next in the course of the
25 prostate cancer?

26 A. Dr. Rosenbloom and I watched the progress of the PSA
27 levels and we also took periodic bone scan tests and MRIs,
28 which would help us determine whether there were any
tissue

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1133

1 formations that were unusual and also whether any of the
2 prostate -- whether the disease had entered the bone
system.

3 The bone scans were always negative.

4 The MRI, at one point, showed a slight elevation of
5 the size of one lymph node, and the PSA continued to rise.
6 And so we were sort of under the gun to make a decision as
7 to whether we start the hormone therapy. Dr. Rosenbloom
8 suggested that to help myself feel less anxious, that I
seek

9 consultation from colleagues at Stanford, which I did in
10 January '91 or '92, I forget which. It must have been
'92.

11 I forgot now.

12 Q. What happened at that point?

13 A. The consultation was basically that there was no
rush
14 to apply the hormone therapy because my clinical condition
15 continued well, and they said that there's an optimal time
16 at which hormone therapy should work, but that optimal
time
17 is not there for me as yet.

18 In other words, you can always reduce the PSA level
by
19 administration of these hormones, but it's your privilege
20 when you want to do that. And so I agreed with them. I

21 said I would wait to see what happened. At that time the
22 PSA was around 34, I think. So we continued to wait and
23 took the MRIs and bone scans periodically and meanwhile,
the
24 lymph node, with the MRI, had decreased in size. It
almost
25 vanished without any hormone therapy.
26 Q. That was before you ever started on it?
27 A. Yeah. And so that was interesting, and Dr.
Rosenbloom
28 took that to suggest that maybe I was having a good fight
to

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1134
1 keep that lymph node system inactive.
2 And then when we got to the summer of '94 -- I think
3 it was '94 -- no, it couldn't have been -- I'm not sure
4 what. Anyway, my PSA went up to 72, which was a little
5 alarming, and so I went to consultation with Dr. Steven
6 Strum, who I had heard at a lecture one time. He spoke
7 about the results of research with the prostate, and he
took
8 a position of definitely endorsing that I start the hormone
9 therapy.
10 I informed Dr. Rosenbloom about it. I had taken all
11 my evidence, all my tests to Dr. Strum. I was not doing
12 this without Dr. Rosenbloom's knowledge. And Rosenbloom
13 then said to me -- this was in August, he said -- oh, yes,
I
14 think it was in '93, August of '93. He said, "Do you want
15 to start this hormone?" I said, "Sure."
16 Well, I started the hormone therapy and wouldn't you
17 know it, the PSA went down to zero in two days, which was
18 what the people at Stanford had told me. They said,
19 "There's an optimal time to start hormone therapy and you
20 can manipulate the PSA level with it," and this is exactly
21 what happened. And it's been zero ever since.
22 Q. Have you had any symptoms related to the prostate?
23 A. Symptoms related to the prostate? No. I mean, the
24 size of the -- the prostate was gone. I had digital
25 examinations periodically, but there was no return of the
26 tissue. There was mild incontinence at the beginning,
there
27 was also some mild impotence which ultimately improved, so
28 there was a full return to being able to have an erection
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1135
1 within six or eight months, which was fine. And there's
2 been no sequelae, except I do have some incontinence from
3 time to time with the results of that surgery.
4 Q. And other than that, before the diagnosis of the
5 mesothelioma, were you feeling okay?
6 A. I was feeling well, fully active, doing the things I
7 needed to do, feeling good, full-time work. The years of
8 '92 and '93 were good years, basically, in terms of my
9 health.
10 Q. What is your understanding of your current status
with
11 respect to the prostate cancer?
12 A. My understanding is that it has been in remission
for

13 some time. I continue on the hormone therapy. My PSA
14 remains at zero. I have no symptoms related to it and it
15 requires no medical attention.

16 Q. Now, when were you diagnosed with the mesothelioma?
17 A. In -- definitively in August. I had entered the
18 hospital in July 17th under the care of Dr. Art -- Arthur
--

19 I forget his last name. It will come to me in a little
bit.

20 He was a chest surgeon, who did what's called a
thoracotomy.

21 Q. Before we get to the thoracotomy --

22 A. Arthur Weber.

23 Q. -- what kinds of symptoms were you having that
caused

24 you to end up in the hospital?

25 A. What kind of symptoms was I having?

26 Q. Yes.

27 A. Oh, back in April, March or April, I developed
28 shortness of breath, which was surprising.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1136

1 Q. Why was it surprising?

2 A. It never happened to me that I would have shortness
of
3 breath. I'm a swimmer. I swim every morning. And one
4 morning I got in the pool and couldn't swim across the
pool,

5 and I knew something was wrong, so my internist had me go
6 see a lung specialist, and I had x-rays and various
studies,
7 and he then thought that I had what was called a pleural
8 effusion, which was an accumulation of fluid around the
9 lung.

10 And that could have multiple reasons, and so I then
11 went back to my oncologist, who removed one-and-a-half
12 liters of that fluid from my chest wall, the chest area,
and

13 submitted all that fluid to the laboratory for
examination.

14 Q. Were you told the results of that?

15 A. Yes. The results were nothing. They didn't find
16 anything wrong with the fluid. But the production of the
17 fluid continued. And so they knew that something was
wrong,

18 even though that the fluid examination did not produce any
19 positive results.

20 And so then an arrangement was made for me to see
21 Dr. Weber, whose name slipped my mind for a moment, and he
22 did this thoracotomy, which was intended to get into the
23 chest to remove a sample of tissue for a biopsy, which was
24 done on July 17th.

25 Q. Was that done in the hospital itself?

26 A. At Cedar Sinai Hospital, yes. And while he did
that,
27 he did what's called a pleuradesis, (phonetic) which has
to
28 do with fusing the two sides of the pleura so that fluid

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1137

1 doesn't accumulate there anymore. And if that's

successful,
2 that's fine, because then any production of fluid is
blocked

3 from going in the pleural cavity.

4 He did that pleuradesis, and that was effective
5 because I've never had any more of that in the pleural
6 cavity, but he also removed the tissue, and in removing the
7 tissue, the microscopic examination proved that it was
8 mesothelioma.

9 Q. Now, initially, was the first diagnosis after they
10 determined that that was malignant, was it mesothelioma?

11 A. The first diagnosis that was made, which was sent

back to my oncologist's office, was adenocarcinoma.

12 Q. The same type of cancer that the prostate was?

13 A. The same label they had given to the prostate, and I
14 think also to the carcinoma of the bowel. I think they
15 called it that, too. But Dr. Rosenbloom was on vacation

at the time and I wanted an opinion of another oncologist, so
I

16 went to see a Dr. Mosher, who was a man that I had known
17 before, and he said: I think we should take this sample
and

20 send it for examination by electron microscope, because
21 that's usually the way in which these diagnosis of
22 mesothelioma is made.

23 Q. Did he tell you that that was a potential diagnosis
at

24 that time?

25 A. Yes, yes, he said that was a potential diagnosis,

and he thought that I deserved to have that study done.

27 Q. Had you ever heard of mesothelioma before that?

28 A. No, I never heard of that. I've learned a lot about

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1138

1 it since, but I didn't know about it until last July.

2 Anyway, so the results came back this time with
3 clear -- the fibers that were contained in the sample were
4 clearly those of, they felt, of mesothelioma. And then as
5 you know, as properly submitted, I've had those laboratory
6 slides sent to -- I took them to Sloan Kettering in New
7 York.

8 Q. Why did you go to Sloan Kettering?

9 A. I went there in October of last year. I wanted
10 another opinion about my condition.

11 Q. What had you been told up until then, once they made
12 the diagnosis of mesothelioma, about mesothelioma?

13 A. It wasn't so much what I was told as what I began to
14 read. It scared the hell out of me. Because the typical
15 first line or two of writing about mesothelioma, the
article

16 says, "Patients with this illness die within six to eight
17 months from the time of diagnosis."

18 And so that was not a very good introduction for me
19 into the whole subject, having read about this in
September

20 of last year and being told by my doctor that the
treatment

21 options were scant, they couldn't do surgery because
they'd

22 have to remove a lung, and other organs or tissue. The
23 radiation was out because it would puncture the lung.
24 Chemotherapy was a very long shot because only 10 percent
of
25 the people who ever got treatment with mesothelioma ever
26 pulled through or improved. So this is what I had heard
27 from my doctor.

28 I went to Sloan Kettering for another opinion, and
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1139

1 they said the same thing. I consulted their chief surgeon,
2 their chief oncologist, and so I came back with a very
3 pessimistic feeling about the whole thing. Especially that
4 if we ever got around to chemotherapy, that we had a slight
5 chance that it would be successful. So that's what I
6 learned about it.

7 Q. Did you continue being treated by Dr. Rosenbloom?

8 A. Yes, I continued -- I think he's a fine doctor and he
9 continued to see me.

10 Q. What kinds of things would he do? This is about
11 September that you went to Sloan Kettering?

12 A. I went to Sloan Kettering on October the 4th. And
13 then when I returned to Los Angeles, Dr. Ilson from Sloan
14 Kettering reviewed his findings with Dr. Rosenbloom, and
15 they both concurred that palliative treatment was
desirable.

16 Q. What does that mean?

17 A. That means treatment that's designed to make me feel
18 more comfortable, not to cure me, but to feel more
19 comfortable. It's essentially what Dr. Horn told me in
20 December. He said, "There is no treatment for you." He
21 says, "I don't think you're going to make it. Go out and
22 have a good time. If you get chemotherapy, it will upset
23 you too much and your way of life will be significantly
24 altered, so relax and enjoy your life a little more."

25 Q. What happened after December? What happened in
26 January?

27 A. In January, Dr. Rosenbloom suggested that I have a
CAT
28 scan to see what the progress of this illness was.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1140

1 Q. How were you feeling up to this point in time?
2 A. Lousy. I had lost 30 pounds, I felt terrible, I was
3 weak, and I had what looked like a pneumonia. I once had
to
4 go to an emergency visit to the hospital because I could
5 hardly breathe, I couldn't sleep. It was awful. And
6 Rosenbloom saw the CAT scan and he says, "Well, we've got
to
7 go for the chemotherapy, we've got to take our chances,"
and
8 I did. I started the chemotherapy in January.

9 MS. CHABER: Are we going to take a break?

10 THE COURT: Sure. We will take a ten-minute recess
at
11 this time, ladies and gentlemen, until 20 minutes to 3:00.
12 Please keep in mind the admonitions given to you before
that
13 you are not to form an opinion about it, you are not to
14 discuss the case with anybody or amongst yourselves. If

15 anyone attempts to discuss the case with you, advise the
16 Court of that fact. Return at 2:40, please.

17 (Recess taken.)

18 THE COURT: Everybody is present, so you may resume
19 your examination.

20 MS. CHABER: Thank you, Your Honor.

21 Q. Dr. Horowitz, we have a fan on now, so you're going
to
22 have to keep your voice a little bit louder than you've
been
23 talking; okay?

24 Dr. Horowitz, have any of your physicians told you
25 that the mesothelioma you have is in any way related to
your
26 previous cancers?

27 A. No, no one has said that to me, that there's any
28 relationship between the current mesothelioma and the

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1141

1 previous cancers.

2 Q. Have you asked them that question?

3 A. Oh, yes, I've asked them that.

4 Q. Now, in January, you indicated that you and
5 Dr. Rosenbloom decided to start chemotherapy?

6 A. Yes.

7 Q. And who was the person who was going to be dealing
8 with the chemotherapy? Was that also Dr. Rosenbloom?

9 A. Yes. I would do it in his office. He had a section
10 in his office that's set aside for the administration of
11 chemotherapy, yes.

12 Q. And when was the first session that you had?

13 A. I think it was in the second or third week of
January.

14 Probably the third week of January.

15 Q. And at that point in time, what do you do when you
16 have chemotherapy? What's the process like?

17 A. Well, you lie down. You are given a drug
18 intravenously that prepares you for receiving the
subsequent

19 drugs that are administered. You are then -- the first
drug

20 that's administered is an antinausea compound, because
21 nausea is a very significant part of chemotherapy. This
is

22 then followed by the administration of two drugs. In my
23 instance it was two drugs. It could be more than two.

24 Q. What were the two drugs?

25 A. The two drugs at the beginning were cis-platinum and
26 adriamycin, a-d-r-i-a-m-y-c-i-n. These are the drugs in
the
27 beginning that were used. And the schedule that I was
given

28 was to appear for chemotherapy for four hours three

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1142

1 consecutive days every third week. In the period of four
2 months, I had a series of six of these three-day-a-week
3 treatments.

4 But the reason it was for four hours was that the
drug

5 was so potent. They administered it in a slow way so that

6 it would take four hours for it to drip into you. And then
7 you'd return the next day and the next day. Well, I don't
8 know how much you want me to tell you about all of this.
9 Q. After the first chemotherapy, did you have -- first

10 of all, when you're having the chemotherapy, is it painful?

11 A. It's not painful as it is that you begin to feel the
12 effects of the nausea. And that's significant. I mean, I
13 had no way of knowing what was going to really happen. I
14 had some discussions with people. I took out books about
15 the effects of chemotherapy, how to deal with them and all
16 of that, but there's no way of appreciating the
deleterious

17 effects and the awful feelings associated with it. It
18 was -- as a matter of fact, it was so bad, that I had to
19 cancel my next month's work. I did not work the whole
month

20 of February because the effects of the chemotherapy after
21 the first treatment were so bad.

22 Q. When you first started the chemotherapy,
approximately

23 how many clients did you have?

24 A. How many clients did I have? Well, not the number
of
25 clients is the number of treatment hours that I scheduled.
26 I would be better able to tell you that.

27 Q. Some people come more than once a week?

28 A. They come anywhere from one to four times a week.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1143

1 Those in analysis come four times a week. Am I speaking
2 loud enough for you?

3 Q. A little bit louder.

4 A. Okay.

5 Q. So how many treatment hours?

6 A. So I would say I had 25 to 30 treatment hours
7 scheduled before this chemotherapy began. I think that was
8 about right. But then I took the month of February off.

9 Q. Before you took the month of February off, did your
10 patients know about your diagnosis?

11 A. Yes, yes, I told my patients about my diagnosis.

They

12 could see that there was something wrong with me. I had
13 lost 30 pounds and I didn't sound right. My voice had
14 changed. I looked bad, I lost my hair with the
15 chemotherapy, but no, I was very honest with them,

and
16 I gave them an opportunity to transfer to other analysts
if
17 they wished to do that, or whatever they wanted to do.

But

18 none did, actually. But as we went along, several
19 established times for termination. In other words, they
20 thought that we could come to an end somewhere soon.

21 I'll give you an example of something that happened
to

22 me that was totally unforeseen. I was with a patient one
23 day and suddenly, I began to have chest pains,
24 irregularities in breathing, stabbing pains in the chest,
25 with even pain radiating down my arm. I thought for sure
I

26 was having a heart attack. So I arranged to have the 911

27 called and I was taken to the hospital, et cetera.

28 And after a long and anxious period, it was
discovered

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1144

1 that I had -- this was one of the consequences of
2 chemotherapy that I didn't know, because I was beginning to
3 get pains in my chest associated with the effects of that.
4 And I began to realize that chemotherapy, the toxic agent
5 that chemotherapy is begins to affect all systems, the
6 poisons of it. So that it affects your respiratory system,
7 your digestive system, your nervous system, all the
systems,

8 and this affected the system that simulated a heart attack.

9 And it was difficult, but I came home that afternoon
10 and I decided I just wasn't going to work this next month
11 because I didn't want to have to go through something like
12 that again.

13 Q. So you took the month of February off?

14 A. I took the month of February off.

15 Q. And how long after the first session of chemotherapy
16 did it take for you to recover to be able to do things
17 again?

18 A. Well, the recovery is interesting. You see, there's
a
19 three-week interval between treatments, and for ten days
or
20 so after the treatment concluded, I'm not able to eat
21 because the nausea is so penetrating, so difficult. And
22 this adds to the problem with the loss of weight. There's
23 no way you're going to gain this weight back while you're
in
24 the process of chemotherapy.

25 Q. Were there things that you attempted to do?

26 A. That I attempted to do about gaining weight?

27 Q. Yes.

28 A. Oh, I was drinking all these supplements like Ensure
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1145

1 and all kinds of milk shakes and all kinds of ice creams.

I
2 was doing exactly the kinds of things that people are
3 careful about in everyday life. I just needed to gain the
4 weight because I knew that if there was an interval that
was

5 clear where I was able to gain weight, I would lose it
again

6 when I started the next round of chemo.

7 So it was ten days after the chemo concluded that I
8 was able to start eating again. But then within a week
9 after that, the anticipation of going back to the chemo
made

10 me loose my appetite all over again. I really had a bad
11 time with this nausea.

12 Q. So you'd go back every three weeks?

13 A. I'd go back every three weeks. The second time
around

14 Dr. Rosenbloom changed the regimen of the medication.

15 Q. Did he tell you why?

16 A. I'm sorry, yes, he told me why. At the end before
you

17 start each round of chemotherapy, you get a set of x-rays.
18 He had chest x-rays taken of me to see what progress there
19 was made since the last time.

20 So the second time around I had the chest x-rays
done,
21 and he said before I went, started the second treatment,
he
22 says, "I'm going to change your medication this time
because
23 I'm not getting results fast enough, because I have an
idea
24 of how quickly I need to see the results on the x-rays
25 before I have a sense that the chemotherapy is going to
help
26 you."

27 So he gave me what's called SVP 16, which is among
the
28 most potent chemical agents that they have yet discovered.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1146

1 They use that in cases of advanced lung cancer. And
2 adriamycin was dropped. I kept on with the cis-platinum.

3 Q. Let me just stop you there for a minute. Did
4 Dr. Rosenbloom tell you if this was something that he had

--
5 whether there was other reports of people using this on
6 people with mesothelioma?

7 A. Before he decided which drug to use, which
combination

8 of chemical agents to use, he said he had done a literature
9 research one weekend where he studied, through a computer,
10 all the reports in the literature about the treatment of
11 mesothelioma with chemotherapy. And these were the two
12 drugs that had the most common use, that seemed to be
13 useful.

14 But then he gave up on this adriamycin after that
15 first test because he knew more about the SVP 17 or 16,
and
16 it was like a miraculous thing happened, because after
this

17 round of chemotherapy, I began to be able to walk, I began
18 to be able to swim a little bit, I began to be able to
walk

19 uphill, things that I couldn't do. My office is up on the
20 second floor of the building behind my house. I had
trouble

21 going up to the office, but now with this second series of
22 treatments behind me, I found it's so much easier.

23 And my patients were telling me that I sounded
better

24 because I had more air in my lungs that I could use.

25 Previously, the air was so bad, that when I started a
26 sentence I had to hurry up and speak so that I could
finish

27 the sentence before the air gave out and I didn't sound
like

28 myself. I'd start to say something and I'd say, "and so
you

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1147

1 have to start doing that," and by then the air was gone and

2 I had to start all over again.
3 Q. I think you just drove the court reporter crazy.
4 A. You could write anything down on that side. But
5 things began to be much better after the second thing, and
6 then progressively, with each time I returned, I took again
7 an x-ray, and the x-rays began to show progress, and I was
8 amazed at that.

9 Q. And so what did Dr. Rosenbloom tell you was
happening?

10 A. He was saying that the x-rays were looking better.
11 And then I had a CAT scan in January and by April, he
12 suggested another CAT scan. And this CAT scan, which was
13 two months after the first one, really began to show some
14 improvement. And then we repeated that in June after the
15 whole series was over, and the radiologist was
unbelievably

16 happy. He said most of it wasn't there. And I was happy,
17 too.

18 Q. And did Dr. Rosenbloom tell you whether or not you
had
19 been cured?

20 A. No, he didn't say I was cured, he said, "You could
21 call this a remission." He wouldn't say anymore than
that.

22 He didn't promise me anything, and he said, "We will keep
it
23 like this, if we can."

24 Q. As a result of the chemotherapy, have you had any
25 ongoing side effects?

26 A. Oh, yes. I've had a lot. I have a series of what
was
27 called peripheral neuralgia. That is, I have numbness and
28 electrical tingling in my fingers running up my hand. I

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1148

1 have them in a couple fingers in this hand.

2 I've also developed numbness and electrical tingling
3 in the soles of my feet and running up my calf muscles, and
4 my stability is poor. When I stand up, I have to hold on
5 before I can feel erect and I can move straight. My whole
6 sense of balance is affected.

7 Q. How would you have been before you started the
8 chemotherapy in January?

9 A. I never had that. I mean, I felt fine. This
business

10 with my -- well, Dr. Rosenbloom recently had me take a
11 series of MRIs of my neck. He thought maybe I had a
pinched

12 nerve, or something else was happening in my neck, and
they

13 haven't been able to find it. I'm still under
investigation

14 with a neurologist about that, because I know that there's
15 something wrong.

16 I mean if I -- let's say I'm walking across the
street

17 and I think I see a car coming, so I want to just trot
18 across the street to get there, I can't do that. I can't
19 get my legs up to start going faster. So that's been with
20 me now since the chemotherapy.

21 Q. And has the hands, the problems with the hands,
caused

22 you to give up or lessen any activities?
23 A. Yes. I play the piano, and so once that began, I
just
24 couldn't play the piano, so I wasn't playing the piano
from
25 October or December -- no, really, since January, when the
26 chemotherapy began until -- I started again in July, and
it
27 feels good, although it's still there, but my teacher says
28 to sort of play through the frailty, play through the

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1149

1 inadequacy.

2 When when my pinky and second finger hit the piano, I
3 don't know that I'm able to hit the note that I intend to
4 hit. I can only hear it and know whether I'm right or
5 wrong.

6 Q. And up until about April of this year, what was your
7 activity level like?

8 A. Up until April of this last year?

9 Q. Yes.

10 A. It was good. I was feeling normal.

11 Q. This year?

12 A. Up until April of?

13 Q. Of this year.

14 A. Of 1985?

15 Q. 1995.

16 A. I'm sorry, 1995. What's my activity level been like
17 this year? Is that your question?

18 Q. Right. Before April when you had the CT scan with
19 improvement.

20 A. It was very limited. I did hardly anything. I
21 couldn't do -- Shirley and I would take walks once a day

for
22 about 20 or 30 minutes, and that was the extent of my
23 physical activity. I couldn't swim, I couldn't walk fast,
24 and I couldn't do a lot of things. I couldn't run. I

like
25 to play basketball with my grandchildren, and I couldn't
do
26 any of that.

27 Q. Were those things that you had been doing before you
28 were diagnosed with the mesothelioma?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1150

1 A. Oh, yeah, very active life, yes.

2 Q. Have you increased your activity since April?

3 A. I've increased my activity since June.

4 Q. Since June?

5 A. Since June. The chemo ended May 14th and beginning

in
6 June, and then into July and now in August, there's been a
7 noticeable pick up in my ability to do things, exercise,
8 except for the unsteadiness of gait and other things that
9 I'm talking about with this peripheral neuralgia. So I do
10 what I can. I try to keep going.

11 I've been able to gain back about 22 pounds of the

30
12 that I lost, and I regard that as a wonderful achievement,
13 because that's added to my energy, sense of energy.

14 Q. When you had the chemotherapy, did you lose your

hair?

15 A. Yes, my hair was gone by the second administration
of
16 it. It just vanished. Not just the hair on my head, but
17 all my body hair, including my pubic hair was gone.
18 Everything. It was gone.

19 Q. And have you -- I see you've regained your --

20 A. It's coming back a little, yes.

21 Q. In terms of your work, have you been able to resume
22 full-time work?

23 A. Oh, no, no, nowhere near that. You see, my
institute,

24 which is composed of a wonderful group of people, we all
25 sort of refer cases to one another, either students in
26 treatment or people who need supervision or people in a
27 community who need treatment. But once the word was out
28 that I was ill, I was not getting any referrals,
obviously,

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1151

1 and I couldn't take any referrals. I wasn't going to
2 promise anybody anything.

3 And so that whole -- I had cases referred to me in
the
4 months of January and February, and I just had to turn them
5 away. So gradually, my practice has deteriorated to now
6 where I have about seven hours a week and in a month. It
7 will be down to two, because a couple of people are
leaving,

8 but I'm not picking up any new patients.

9 So the word gets out that you're not well or haven't
10 been well. And I'm trying to get the word out that I'm
11 better. But I may be retired sooner than I thought.

12 Q. Before you were diagnosed with mesothelioma, did you
13 have intentions of retiring?

14 A. Yes, I thought about it. I thought about
15 progressively cutting back in my hours and somewhere this
16 year or next year to cut back significantly. In my
17 business, people don't literally actually retire.

18 Q. Why is that?

19 A. It's easy enough to see people. They just come to
20 your office and you talk to them and you don't see as many
21 as you used to, but then there are those who want to hang
22 on, want to keep talking, so you have a few around that

you
23 work with. But I don't know too many shrinks who actually
24 retire. Shrinks, I'm sorry, I use that word --

25 Q. That's all right. Everybody uses that.

26 A. Okay.

27 Q. I think somebody asked you how that came about,

28 A. Everyone's asked me that, and I gave some answer
which

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1152

1 I hope it's right. It has to do with the shrunken head
2 notion of people in Africa who will use the shrinking of
3 heads as a form of treatment.

4 Q. You don't literally do that, do you?

5 A. No.

6 MS. CHABER: I'd like to have five photographs marked
7 as plaintiffs' next in order.

8 THE CLERK: Plaintiffs' Exhibits 37, 38, 39, 40 and
9 marked for identification.
10 (Plaintiffs' Exhibits 37 - 41 marked for
11 identification.)
12 MS. CHABER: Q. Dr. Horowitz, I'm handing you five
13 photographs with exhibit numbers on the back, 37 through
41,
14 and I'd ask you to go through them one at a time and
explain
15 when they were taken and who's in them.
16 MS. CHABER: May we display them, Your Honor? I
move
17 them into evidence.
18 MR. OHLEMAYER: No objection.
19 (Plaintiffs' Exhibits 37 - 41 received in evidence.)
20 THE WITNESS: This is a picture taken of my wife and
21 myself at my 50th college reunion in 1993 back in New
York.
22 This is what I looked like in 1993.
23 In that same year in October, my youngest daughter
was
24 married, and this is my daughter and I dancing at that
25 wedding. This is a picture of myself and my wife dancing
at
26 my 70th birthday party two years ago.
27 Now, these two pictures are pictures after the fact.
28 In other words, this shows me on father's day of this year
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1153
1 with two of my grandchildren. They came down to visit with
2 me on father's day which was, I think, June 16th or 17th.
3 It was a day in which I had already been told that I was in
4 remission, so we were all pretty happy about that.
5 My physical condition was pretty rundown still, and
6 you could see what I looked like then compared to what I
7 looked like before. And there's a picture of me with my
son
8 and son-in-law, even on Father's Day in June, still having
9 no hair.
10 MS. CHABER: May I pass them, Your Honor?
11 THE COURT: All right.
12 (Pause.)
13 MR. BRAKE: Your Honor, in the interest of
concluding
14 with today's witnesses, I wonder if we could continue the
15 examination.
16 THE COURT: Go ahead.
17 MS. CHABER: Q. Dr. Horowitz, have you been able to
18 estimate how much income you have lost as a result of your
19 mesothelioma?
20 A. I think I provided your office with some figures. I
21 don't recall them offhand.
22 Q. Would it help you to refresh your recollection to
look
23 at what you provided?
24 A. Yeah, what I had written.
25 MS. CHABER: For the record, I'm handing Plaintiff
26 further responses to Defendant Lorillard Judicial Counsel
27 Form Interrogatories dated August 16th, 1995.
28 Q. Why don't you take a moment to review it and see if
we

1154

1 can shorten this?
2 A. May I go on?
3 Q. Yes.
4 A. The first category of loss has to do with all the
time
5 that was lost from my work in going to doctors for
6 consultations, going in for surgery, having chemotherapy
and
7 so forth, and my fees and my work run 100 to \$120 an hour.
8 So all the missed hours that I had to be away are shown
9 here. Do I have a grand total?
10 Q. Did we add it up, is the question?
11 A. And then another group of loss has to do with
12 premature termination of patients, because I did not know
13 how long I'd be able to work with them. I talked with
them
14 about leaving or transferring to someone else, and so
15 there's totals here of about \$20,000 that has to do with
16 prematurely terminating patients, and so forth.

17 And then there's another group of people that I had
to
18 turn away, that is people who were referred to me who I
19 could not see. These are people who would be seeing me
once
20 or twice a week for an indefinite period of time, so one
21 could only approximate what loss there is on that. I
would
22 estimate another 20 or \$30,000 from that. And the charges
I
23 have here are for a total of 31,000,
24 Q. And the 31,000 is for which of those categories, the
first category --
26 A. Yeah.
27 Q. -- about doctors?
28 A. Each patient would have stayed in treatment at least

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1155

1 through the year 1995. These are those patients that I had
2 to turn away. So for over an 11-month or 12-month period,
a
3 total income of about 34,000 was lost because I couldn't
4 work with any of these four or five patients.
5 Q. Can you estimate what the income loss was as a result
6 of the first category, going to doctors visits and so
forth?
7 A. That estimate.
8 Q. No one totaled it?
9 A. I'm sorry, I don't see a total of those hours, unless
10 we took the time now to start doing that. I would guess
11 that ran into 40 or \$50,000, over a couple year period,
that
12 that was lost, and all the hours lost in chemotherapy, I
13 think. So a rough approximation of the loss of time and
14 effort associated with mesothelioma is probably in the
15 neighborhood of \$100,000, something like that.
16 Q. And can you estimate -- you indicated that you were
17 going to try to cut down and phase out your work over the
18 next couple of years?
19 A. Yes, I probably will within this year, because I

don't

20 see any new patients coming on. I have terminated nearly
21 all of those, and I have seven hours of treatment left and
22 two patients are leaving, so I'll have two hours left
within

23 a matter of a couple months, so by the end of this year,
I'm
24 a guy who's out of work.

25 Q. Can you estimate what that will amount to in lost
26 income over the next two or three years?

27 A. I would say very, very modestly, even at the rate of
28 \$50,000 a year, would be \$100,000 over the next couple of

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1156

1 years.

2 Q. Dr. Horowitz, are either of your patients -- you
3 mentioned that your father had died. Is your mother still
4 alive?

5 A. Yes, my mother is alive at age 94.

6 Q. And since you've had this recovery from the
7 mesothelioma, have you been able to do any traveling?

8 A. Yes, I've traveled. We went on a cruise in June that
9 was a wonderful, liberating feeling to get out of the whole
10 feeling of being stuck with the mesothelioma; that is,

with

11 the chemotherapy, particularly to be able to go out and
get
12 some air and start eating again.

13 So we went on that trip, and we've been on a couple
of

14 small trips to San Francisco and to San Diego, but these
15 have been small trips.

16 Q. And during the time of the chemotherapy, did you
17 notice any changes in your mental capacity?

18 A. Yes. There was changes in my mental capacity. I

was

19 very depressed. It was terribly depressing to be
struggling

20 with that. I mentioned previously that I sought and got

the
21 help of a psychiatrist who saw me once a week for about
22 three months to help me over that. It was very hard.

23 But I also noticed that my own power of

concentration

24 had diminished. I was not able to read professional
25 literature very well. If I went to a scientific meeting
26 with colleagues, talked about things, I couldn't
concentrate

27 beyond a very limited degree.

28 The things that I read changed. I couldn't read

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1157

1 nonfiction. That required too much concentration. I went
2 to simple little stories or detective stories. I like
3 sports very much and I read the sports pages regularly, but
4 I even had trouble keeping up with who was doing what and
5 where. It was hard to keep myself occupied mentally.

6 Q. Is that improving?

7 A. That's improving. That's improving. And now that my
8 patients are gone, my mind is active and good again, and I
9 need somebody to work with and things to do. But I'm

10 finding things to do. I mean, I wouldn't feel sorry for
me
11 on that count. That's improving.

12 Q. Have you noticed any changes in or any effect on
Shirley as a result of the mesothelioma?

13 A. Oh, yes, there were many effects on Shirley during
14 that time, because she's very loving and very devoted, and
15 she didn't know what to do for me. She didn't know what
16 kind of meals to prepare that I might be able to eat or
what
17 to get me to be helpful to me.

18 It was terribly hard on her, and I felt awful that
she
19 was going through all of this. And she had, you no know,
20 this last spring, in the spring of '94, she herself went
21 through a cancer of the breast and needed to do something
22 about, so I was investigating my illness in the spring and
23 she had surgery for her.

24 So then after she was recovering, then she had to
take
25 care of me, and it was terrible. It was terrible for her.
26 Not so easy for me.

27 Q. Before you had the diagnosis of mesothelioma, what
28 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1158

1 were your plans for the future?

2 A. Well, the plans were to progressively retire, to
3 travel, to spend more time with my grandchildren, to maybe
4 write a couple things that I had thought about doing, to
5 continue to take piano lessons and improve my piano
playing,

6 and just to lay back and relax.

7 Q. Have your plans changed at all since the diagnosis?

8 A. Well, for the few months in which I was going through
9 the mesothelioma and not knowing what the outcome might be,
10 I was in the tank. I had no way of being able to talk
about

11 the future.

12 I saw Dr. Horn in December of last year and when I
13 started the chemo, people were talking about me like I was
14 going to be dead by this summer, so there was no future to
15 plan for. But now that I seem to have a reprieve, now I'd
16 like to continue to have more of the same and worry about
17 what to do.

18 Q. Are you feeling more optimistic?

19 A. I'm optimistic. If I can hold my own, I'll be all
20 right without feeling that there will be a cure for this,
21 but at least some sense that the disease is not marching
on

22 in its relentless manner.

23 MS. CHABER: Thank you. I have nothing further.

24 CROSS-EXAMINATION BY MR. OHLEMAYER

25 MR. OHLEMAYER: Q. Good afternoon, Dr. Horowitz.

26 A. Good afternoon.

27 Q. I'm Bill Ohlemeyer. We met in April at your
28 deposition.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1159

1 A. Right.

2 Q. When your doctors diagnosed you with adenocarcinoma
of

3 the colon, did they tell you what caused that cancer?
4 A. No, they could not.
5 Q. And do you understand adenocarcinoma is a type of
6 cancer just like mesothelioma is a type of cancer?
7 A. Yes.
8 Q. And when your doctors then diagnosed you with
9 adenocarcinoma of the prostate, could they tell you what
10 might have caused it?
11 A. No, they couldn't tell me what caused it.
12 Q. And then over the years, you've had some basal cell
13 cancers removed?
14 A. I've had those little pink lesions on my legs and
arms
15 that were removed. These are the basal cell things that
16 don't have any real danger of getting in under the skin,
but
17 they are on the surface, yes.
18 Q. Did any of your doctors involved with that tell you
19 what might have caused those cancers?
20 A. Yes. Excessive exposure to sunlight.
21 Q. And has your mother had cancer?
22 A. My mother had one kidney removed about 23 or four
23 years ago.
24 Q. And when you were originally diagnosed with your
lung
25 problems, the doctors thought it was adenocarcinoma of the
26 lung?
27 A. No, no, nobody ever thought that I had anything
wrong
28 with the organ called the lung. It was always in relation
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1160
1 to what was going on outside, the pleural cavity. There
was
2 a pleural effusion and they did not know what was causing
3 that, but they never mentioned to me that it might be a
4 cancer of the lung.
5 Q. But they did mention to you that it might be an
6 adenocarcinoma?
7 A. No, they didn't mention, they didn't say that. The
8 word adenocarcinoma came back from the pathologist in the
9 first review of the slide that was based on the biopsy done
10 by Dr. Weber, but the doctors themselves, Dr. Rosenbloom
or
11 even the doctor, Dr. Weber and others, never used the word
12 "adenocarcinoma."
13 Q. With you?
14 A. With me.
15 Q. From the time you had the biopsy, though, until the
16 time they told you that you had mesothelioma, some time
17 passed; is that right?
18 A. The biopsy was done July 17th. I was told about
19 mesothelioma about August the 4th or 5th, or something
like
20 that.
21 Q. And at that time, at least one of your doctors told
22 you that mesothelioma could be caused by exposure to
23 asbestos?
24 A. Dr. Rosenbloom said, "When had you been exposed to
25 asbestos?" as soon as the diagnosis was heard, right.
26 Q. And at that point, you started to think about or
27 reconstruct where you might have been exposed to asbestos?

28 A. Right, I did.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1161

1 Q. And you talked with your doctors about the troop ship
2 in the military?

3 A. Yes.

4 Q. You talked with them about the construction in
5 Cleveland and the construction in Los Angeles?

6 A. Correct.

7 Q. And you talked with them about the asbestos pipe
8 covering in your basement?

9 A. Correct.

10 Q. And at some point after that, you hired a lawyer?

11 A. Right.

12 Q. And a lawsuit was filed on your behalf?

13 A. Correct.

14 Q. And that lawsuit named the manufacturers and
suppliers

15 of asbestos products you might have been exposed to in the
16 Army or in the construction or in your home?

17 A. Right.

18 Q. And you also hired a lawyer in Los Angeles to file
19 another claim?

20 A. Well, that was the unemployment compensation lawyer,
I

21 think, associated with my working at Reiss Davis, but that
22 has ultimately gone by the boards and that has become a
23 nonissue.

24 Q. But when you filed -- when that lawyer filed that
25 claim for you, you claimed that you had been exposed to
26 asbestos at the places you worked, and it had caused your
27 mesothelioma?

28 A. I don't know if I told them all of that and in
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1162

1 whatever I had submitted. I don't recall.

2 Q. Ms. Chaber's office made the appointment with Dr.
Horn

3 for you?

4 A. Correct.

5 Q. And Dr. Horn -- you knew you weren't seeing Dr. Horn
6 for any kind of treatment or advice about treatment?

7 A. No, right.

8 Q. And you and Mrs. Horowitz went to see Dr. Horn?

9 A. Right.

10 Q. And he took a history from you?

11 A. Right.

12 Q. Filled out some -- you filled out some forms for
him?

13 A. Right.

14 Q. You had a conversation with him?

15 A. (Witness nodded.)

16 Q. And he asked you about your cigarette smoke?

17 A. Right.

18 Q. And you told him -- and by the way, was that the
first

19 time you had been asked to sit down and think about what
20 cigarettes you smoked and when you smoked them?

21 A. Right, that's the first time I had a smoking history
22 taken.

23 Q. And you told Dr. Horn that you started smoking in

24 about 1944?
25 A. Right.
26 Q. And you told Dr. Horn that sometime after you moved
to
27 Cleveland, you started smoking Kent cigarettes?
28 A. Kent filter cigarettes, right.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1163

1 Q. And you told Dr. Horn that in, I think you said in
2 1963, you quit smoking?
3 A. Uh-huh.
4 Q. And you told Dr. Horn that when you started smoking
5 Kent, the filter was blue; is that right?
6 A. Yes.
7 Q. And you told them that it was the color of your
8 father's eyes?
9 A. I don't remember whether I told him that or not, but
10 that's what I was thinking about at the time.
11 Q. And you told him that four years, about four years
12 after you started smoking Kent, the color of the filter
13 switched to white?
14 A. That's right.
15 Q. And you told Dr. Horn that you smoked probably never
16 more than a pack of cigarettes a day?
17 A. Right.
18 Q. And then the lawsuit changed, Lorillard was added,
19 Hollingsworth and Vose was added; is that right?
20 A. Yes.
21 Q. And your lawyers arranged for a deposition to be
taken
22 in Los Angeles?
23 A. Right.
24 Q. And we came down to ask you questions?
25 A. Right.
26 Q. Ms. Chaber asked you questions; is that right?
27 A. Yes.
28 Q. And there were other lawyers who asked you
questions?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1164

1 A. Right.
2 Q. And at that deposition, you weren't shown any
3 photographs like you were today; is that right?
4 A. No, that's correct.
5 Q. You have to answer for the court reporter because
when
6 you nod, I know what you're trying to say, but she's just
7 trying to listen.
8 A. All right.
9 Q. And at that deposition, you weren't asked about
10 television shows and magazines, things like that?
11 A. No, that's not true. You asked me what kind of
12 magazines we subscribed to that I read, both professional
13 and for family entertainment.
14 Q. That's right. And Ms. Chaber asked you some
questions
15 about what cigarettes you smoked and when you smoked them?
16 A. Right.
17 Q. And I got to ask you some questions about that?
18 A. Right.
19 Q. And you told us at the deposition that you switched

to
20 Kent cigarettes sometime after you moved to Cleveland?
21 A. Correct.
22 Q. You told us that at the time you started smoking
Kent,
23 that Marlboro filtered cigarettes and Kool filtered
24 cigarettes were on the market?
25 A. I don't believe I said that. I said that I was
aware
26 that friends in Cleveland were smoking Marlboro and I
27 remember seeing filters, but I did not remember timing
this
28 to say at the time that I started to smoke Kents that I
also

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1165
1 saw that -- saw those. I don't recall that part.
2 Q. Well, Doctor, let me show you a portion of that
3 deposition.
4 MR. OHLEMAYER: Your Honor, it's page 149, line 21
5 through page 150, line 4.
6 (Portion of videotape deposition being played.)
7 MR. OHLEMAYER: It was actually page 148, Your Honor,
8 I'm sorry.
9 Q. And that was your testimony at the deposition?
10 A. Yeah. The phrase that is very critical in that
11 question of yours had to do with "at the time that you
12 switched to Kent." I don't think that was true at the
time
13 that I switched to Kent. That is to say, I don't recall
14 that there was a juxtaposition of time when either Kool or
15 Marlboro had a filter type. I don't know what the history
16 of Marlboro was at all, but I know while I was in
Cleveland
17 there were Marlboro filter tips.
18 Q. Let me ask you, Doctor, if you remember this
question
19 and that answer.
20 "Can you think or can you describe for me the brand
21 names of any other filtered cigarettes that were on the
22 market at the time you switched to Kent?"
23 And your answer was: "Well, I think Kool had a
filter
24 tip, I think. I can't recall any others."
25 And I asked: What about Marlboro?"
26 And your answer was: "Marlboro, I think, had a
27 filter. Yeah, they had a filter flip top box, I
believe."?
28 A. Yeah, but where I think I erred in that answer was

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1166
1 that it was not specific to your phrase at the time. I
2 wasn't alert to the use of the phrase.
3 Q. And you also -- by the way, Doctor, at the
deposition,
4 do you remember telling me that if you didn't understand
any
5 of the questions I asked you, that you'd let me know?
6 A. Sure.
7 Q. And at the deposition, you also told us that at the
8 time you switched to Kent, it was a popular brand of

9 cigarettes?
10 A. Yeah, I gathered it was, yeah.
11 Q. And again, at the deposition, you told us that the
12 color of the filter, when you started smoking Kent, was
13 light blue?
14 A. Blue, yes, light blue.
15 Q. And that four years later, it suddenly became white,
16 it wasn't blue anymore?
17 A. That was my memory, right.
18 Q. And at the deposition, do you remember telling us
that
19 when the color of the filter changed, that you recalled
the
20 word Micronite was not used to describe the filter
anymore?

21 A. No, did I say that? If I said that, I was wrong,
22 because the box that I just saw had the word "Micronite"
on
23 it, and it was a tall box, a king size, so the Micronite
24 phrase continued.

25 Let me ask you, Doctor -- page 149, Your Honor, line
26 21 through line 4 on the will following page -- if you
27 remember this question and this answer from the
deposition.

28 (Portion of videotape deposition being played.)
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1167

1 MR. OHLEMAYER: Q. And Doctor, at the deposition
2 you told us again that you smoked about a pack a day, no
3 more; is that right?

4 A. That's correct.

5 Q. And that you quit smoking cigarettes at or about the
6 time the Surgeon General report on smoking and health --

7 A. I didn't associate that, necessarily, with the
Surgeon

8 General's report. I know that my quitting occurred in the
9 beginning of 1963, and the Surgeon General's report could
10 have been later or earlier. I wasn't sure.

11 Q. Doctor, let me ask you if you remember this question
12 and this answer from your deposition at page 146, line 1.

13 "And you smoked Kent cigarettes until you quit
smoking

14 cigarettes entirely?"

15 Your answer was: "Correct."

16 And the question at line 15: "Did you quit smoking
17 before or after the Surgeon General's report which
discussed

18 smoking and its relationship to cancer?"

19 And your answer was: "I quit smoking New Years'
20 weekend in '63. I think the Surgeon General's report was
21 either '62 or '63, something like that, so I'm not
22 altogether sure."

23 And my question then was: "So your best
recollection

24 is you quit smoking at or near the time the Surgeon
25 General's report came out?"

26 And your answer was: "Yeah."

27 MS. CHABER: No, Your Honor, there's a remainder of
an
28 answer that should be --

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 MR. OHLEMAYER: I'll read it, Counsel.

2 "Yeah. There had been some stuff in the press about
3 it back in the early '60s, and I remember when I was in
4 Berkeley that year, '61-'62, there was a lot of discussion
5 about it with my professional colleagues and friends.

6 THE WITNESS: That's right, but I wasn't saying it
7 being the Surgeon General's report, but the dangers
8 associated with smoking. It could be that it was in '64.

I
9 just don't know the date of the Surgeon General's report,
10 and I made it clear in qualifying my answer that I wasn't
11 sure.

12 MR. OHLEMAYER: Q. Now, Doctor, when you smoked

Kent cigarettes, during the time you smoked Kent cigarettes,
the
13 only changes that you could recall were the blue filter
14 changing to white, some changes in the packaging, the
color
16 of the packaging?

17 A. It seemed to change a little, yeah.

18 Q. You don't recall any changes in the taste or flavor
of
19 the cigarette?

20 A. I think I said that the drawing was easier, I could
21 inhale more easily, although that wasn't that conspicuous.

22 Q. And you don't recall the price going down during the
23 time you smoked?

24 A. No, I don't recall anything about the price, no.

25 Q. Now, Doctor, your diagnosis, your current illness
has
26 obviously caused you some anxiety and some distraction?

27 A. Correct.

28 Q. And in the past, you've studied things like memory
and

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 recollection, haven't you?

2 A. Yes.

3 Q. And, in fact, you wrote a paper on it on judging
4 intelligence in action that was published back when you
were

5 in Cleveland?

6 A. Right.

7 Q. And in that paper you said, and will you agree with
8 me, that the process of recall is clearly affected by
9 anxiety and other distractions?

10 A. Uh-huh.

11 Q. And you've also studied the role that hindsight
plays

12 in people's abilities to recall things?

13 A. Uh-huh.

14 Q. And you've studied the role it plays in the way
people

15 fill in gaps in their memory?

16 A. Yes. You mentioned this to me last time at the
17 deposition, right.

18 Q. And at the deposition, you defined hindsight for me
as
19 being able to look back after an event occurs and using
20 today's knowledge to determine why something happened?

21 A. Uh-huh.
22 Q. Now, finally, Doctor, you've told us that one of the
23 reasons you connect -- one of the things you remember
about
24 the cigarette filter being blue was it was the color of
your
25 father's eyes?
26 A. Correct.
27 Q. Did your father have brown eyes?
28 A. No.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1170
1 Q. Was your father's name Isadore Horowitz?
2 A. Right.
3 Q. And he was a grocer?
4 A. Right.
5 Q. And he lived in New York?
6 A. Right.
7 Q. Came to this country from Austria?
8 A. Right.
9 Q. Your mother's name was Tessie?
10 A. Right.
11 Q. And she came to this country from Poland?
12 A. Right.
13 Q. And there came a time when your father became a
United States citizen?
14 A. Correct.
15 Q. And your birthday is July 24th, 1923?
16 A. Right.
17 Q. And you lived in Brooklyn with your parents?
18 A. Right.
20 MR. OHLEMEYER: I want to mark this next in order,
21 Your Honor.
22 MS. CHABER: May I see it first?
23 MR. OHLEMEYER: Sure.
24 THE CLERK: Defendants' Exhibit G marked for
25 identification.
26 (Defendants' Exhibit G marked for identification.)
27 MR. OHLEMEYER: Q. Doctor, let me hand you what
I've
28 marked as Defendants' Exhibit G, and let me ask you, is
that

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1171
1 your father's signature?
2 A. Yes.
3 Q. And this is a declaration of intention to become a
4 citizen? Is that the title on it?
5 A. Yes.
6 Q. And attached to it is a petition for naturalization?
7 A. Petition for naturalization. Okay.
8 Q. And on the first page is where your father's
signature
9 is?
10 A. Yes.
11 Q. Right up there about the fourth line down, doesn't
it
12 say that the color of his eyes is brown?
13 A. That's what it says. But that's not true. What it
says was just not true. The man had blue eyes. I have

blue
15 eyes, my sister has blue eyes, and the color of blue has
run
16 through this family for generations. And I don't know who
17 got this information or how it was put down, or I just
don't
18 know that, but there's no question that this is
inaccurate.
19 I mean, period. What do we do with that? Are you telling
20 me that my father had brown eyes?
21 Q. All I'm telling you is that's what it says in this
22 petition.
23 A. That's wrong; pure and simple, totally wrong.
24 MR. OHLEMEYER: That's all I have, Your Honor. I
move
25 G into evidence.
26 THE WITNESS: That's ridiculous.
27 MS. CHABER: I would object to moving it into
evidence
28 as a hearsay document, Your Honor.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1172

1 THE WITNESS: I mean, gee, do you know what people
who
2 came to this country --
3 THE COURT: Wait until there's a question.
4 It may be admitted.
5 (Defendants' Exhibit G received in evidence.)
6 MS. CHABER: It's not even certified, Your Honor.
7 MR. OHLEMEYER: Yes it is.
8 MS. CHABER: Not the one you gave me.
9 THE WITNESS: That's ridiculous. Are you trying to
10 tell me what my father's eyes were?

CROSS-EXAMINATION BY MR. BRAKE

11 MR. BRAKE: Q. Doctor, I just have a couple of
12 questions for you. My name is Stephen Brake, Doctor.
13 Four years after you began smoking Kent cigarettes,
14 the filter became white? Is that your testimony?
15 A. So I recall, yes.

16 MR. BRAKE: If I could have this marked for
17 identification.
18 THE CLERK: Defendants' Exhibit H marked for

identification.
19 (Defendants' Exhibit H marked for identification.)

20 MR. BRAKE: Q. Doctor, let me show you, if I
could.
21 The cigarette that you told us you smoked was porous, had
an

22 porous-type filter?
23 A. Yes.
24 Q. Was that this cigarette in the middle?
25 A. That certainly looks like it.
26 Q. That was your blue cigarette, had the blue filter
like

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1173

1 your father's eyes; right?
2 A. Uh-huh.
3 Q. You smoked those for four years?
4 A. Right.
5 Q. And the one in the middle, right, Doctor?

6 A. Right.
7 MS. CHABER: Are you moving that into evidence?
8 MR. BRAKE: If you wish.
9 MS. CHABER: I think if he's going to display it.
10 MR. BRAKE: Q. Doctor, then you had a white
filter;
11 is that correct?
12 A. Well, I can't tell you that what you've just pointed
to looks like the filter cigarette and the white one. I
13 don't know what the white filter cigarette looked like. I
14 mean, I didn't pay attention to it like I did to the blue
15 one.
16 Q. This is white, right? You would agree with me?
17 A. Compared to the blue, right.
18 Q. Now, when you noticed the cigarette go to the white
19 filter, you didn't notice any difference in the porosity;
is
21 that what you told us?
22 A. That's what I'm saying. That is, I did not
investigate the porosity in relation to the way it used to
23 be, no, I did not. I remember the blue with the porosity.
24 I don't remember what the white looked like.
25 Q. Well, when the change goes from blue to white, you
don't remember any difference in porosity?
26 A. I don't remember that I paid any attention to the
27
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1174
1 difference in porosity, and I don't know whether it was
2 different in porosity or not. I just don't recall that I
3 paid attention to it.
4 Q. Now, with respect to the exhibit that just went in
evidence with regard to your father's declaration of
5 intention to become a citizen --
6 A. Yes.
7 Q. -- would you agree with me that your father, putting
8 his personal particulars down in connection with becoming a
9 United States citizen, would have wanted to get those
10 correct?
11 A. My father would not have done this because he could
12 not write English at the time. And whatever was done was
13 done by somebody else who listened in some way, or else
had
14 the impression that his eyes were one color or another
15 through what they thought they saw, but he could not
16 write.
17 Even in his older years he had trouble writing English, so
18 he could write other languages, but not English, and I
doubt
19 very much that he put anything down in filling out an
application. He was not educated.
20 Q. Do you have the document in front of you?
21 A. Yes, I do.
22 Q. I mean, you hear what I'm saying, if I may be
permitted, for a moment. He could not read what he had
23 signed. This is what many naturalized people went
through.
24 I knew it from other members of my family. They just were
25 uneducated in English and were told what they were
signing,
26 maybe, and signed it. But he couldn't see what he was
27
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 signing.

2 Q. Doctor, your father was a grocer, that's correct?

3 A. Yes, he was a grocer, yes.

4 Q. His color of hair was brown?

5 A. The color hair was brown, right, like mine used to
be,
6 right.

7 Q. The country from which he emigrated is correctly
8 listed?

9 A. Yes, it was from Austria; correct.

10 Q. In fact, the case is, Doctor, everything on here --

I
11 understand you've taken issue with the eye color, but
every

12 other particular listed here is correct?

13 A. He was more than five feet five inches, what that
14 says. His color was white, his complexion was fair, hair
15 was brown. What does it say the weight was? I can't read
16 that. 155, or something? The brown hair, but the eyes

were
17 certainly not brown. Somebody had the fantasy that his
eyes

18 were brown.

19 Yes, there were no other distinctive marks. He came
20 from Huslatyn, which is a suburb of Poland. Actually,
21 Galicia was both in Poland and Austria, in the old days,

and
22 still controversial to where it belonged. He lived on
23 Watkin Street in Brooklyn. The ship he came across on

Graf
24 Waldersee, and wife is Tessie, that's right, that was my
25 mother. Yeah, okay.

26 Q. So it's all correct, but you disagree with the eye
27 color?

28 A. Absolutely. Oh, totally.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 MR. BRAKE: Thank you, Doctor. That's all.

2 REDIRECT EXAMINATION BY MS. CHABER

3 MS. CHABER: Q. Dr. Horowitz, what color was your
4 father's eyes?

5 A. Blue. Absolutely, totally, unmistakably blue.

6 Q. And you said that your father didn't write English?

7 A. No.

8 MR. OHLEMAYER: Objection, Your Honor, it's leading.

9 THE COURT: That's all right, but don't do it

anymore,

10 please.

11 MS. CHABER: Q. What languages did he write?

12 A. He wrote Polish, he could write German, he wrote
13 Yiddish, but he couldn't write English. He hardly spoke
in

14 English. He ultimately learned English. As a grocer, he
15 picked up the language with the people around him, but at
16 home, he spoke Yiddish all the time.

17 Q. When he read, what language did he read in?

18 A. He read the Yiddish papers, the Daily Forwards in

New

19 York, which is a Jewish paper, he read that.

20 Q. Did he read the English papers?

21 A. He'd look at the New York Daily News mostly for the

22 pictures, but he didn't read the stories. He couldn't.
23 Because when I was eight years of age, I would read it to
24 him, and he was very proud of me to read English. And he
25 said, "You're going to do well in this country because you
26 can read."

27 MS. CHABER: I don't have anything further.

28 THE COURT: Any other questions?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1177

1 MR. OHLEMAYER: No, Your Honor.

2 THE COURT: Any member of the jury have a question?

3 Apparently not, Doctor. Thank you very much. You may be
4 excused.

5 MR. OHLEMAYER: If H hasn't been moved into evidence,
6 I would move it.

7 THE COURT: Do you want that in evidence?

8 MR. BRAKE: Sure.

9 THE COURT: All right.

10 (Defendants' Exhibit H received in evidence.)

11 MS. CHABER: Your Honor, could we see you at sidebar
12 for a moment?

13 THE COURT: All right.

14 (Sidebar conference.)

15 (Discussion off the record.)

16 MS. CHABER: At this time, Your Honor, the plaintiff
17 would call to the stand Shirley Horowitz.

18 THE CLERK: Please raise your right hand.

19 SHIRLEY HOROWITZ,

20 having been called as a witness on behalf of herself, was
21 duly sworn and testified upon her oath as follows:

22 THE CLERK: Please state your name and spell your

name

23 for the record.

24 THE WITNESS: Shirley Horowitz, S-h-i-r-l-e-y,
25 H-o-o-r-o-w-i-t-z.

26 DIRECT EXAMINATION BY MS. CHABER

27 MS. CHABER: Q. Mrs. Horowitz, the first question I
28 want to ask you is: Did you know your husband's father?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1178

1 A. Yes.

2 Q. And how old were you when you met him?

3 A. I was about 19 or 20.

4 Q. And do you know what color eyes he had?

5 A. He had blue eyes.

6 Q. Mrs. Horowitz, how old are you?

7 A. I'm 69.

8 Q. And how long have you and Mike been married?

9 A. 48 years.

10 Q. And was there ever any time that you two were
11 separated?

12 A. No.

13 Q. When you first got married, where were you living?

14 What city?

15 A. We got married in Brooklyn, New York, and
immediately

16 moved to Topeka, Kansas after the marriage.

17 Q. And was that when your husband was in school there?

18 A. Right, AT Meninger's, and KU, Kansas University.

19 Q. And then from there, did you move to Cleveland?

20 A. Right.

21 Q. Did you go with your husband immediately to
Cleveland
22 from Kansas?
23 A. I stayed over at my mother's house for a few weeks
or
24 months, I don't recall just when, before he was able to
find
25 a house, and we agreed on the house when I saw it after a
26 trip to Cleveland, and then we moved the household to
27 Cleveland.
28 Q. And how many children did you have at that time?
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1179
1 A. Two.
2 Q. And which children were those?
3 A. Steve and Sherry.
4 Q. And what year was Steven born in?
5 A. '49.
6 Q. And Sherry was born in what year?
7 A. '50, 15 months apart.
8 Q. When you lived in Kansas, did you smoke?
9 A. Yes.
10 Q. And what did you smoke?
11 A. I smoked whatever was in the house, which was
usually
12 Chesterfield.
13 Q. And then when you moved to Cleveland, did you
continue
14 to smoke?
15 A. Yes.
16 Q. And what did you smoke when you lived in Cleveland?
17 A. Kents.
18 Q. Who bought the cigarettes in the house?
19 A. I recall I usually bought cartons at the grocery
when
20 I went shopping.
21 Q. Do you know what the price of the cigarettes you
bought were?
22 A. No. I didn't pay any attention to it. Mike liked
the
24 cigarettes. He wanted them, and I got them.
25 Q. Did you ever talk to your husband about smoking Kent
26 cigarettes?
27 A. No.
28 Q. Back in the 1950s, did smoking have the reputation
it
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1180
1 does today?
2 A. No. It was a whole different world, and from the
3 continuation of World War II and the use of cigarettes as a
4 way of connecting with people and being patriotic for the
5 boys to give them cigarettes, and so on. In the '50s, it
6 carried over, and there was a comradery with the
cigarettes,
7 and there wasn't the sense that you were doing that much
8 damage to yourself by smoking. And also, there wasn't the
9 questioning of the written word and advertising as there
can
10 be today.
11 Q. Did you see advertising for Kent?

12 A. Yes.
13 Q. What, if anything, do you recall about the
14 representations in the advertising for Kent?
15 MR. OHLEMAYER: Objection, Your Honor, relevance.
The
16 ads speak for themselves.
17 THE COURT: Sustained.
18 MS. CHABER: Your Honor, this goes to issues of
19 representation, which are issues in this case.
20 THE COURT: All right, then, go ahead, ask it.
21 MR. OHLEMAYER: Same objection, Your Honor.
22 THE COURT: Overruled.
23 MS. CHABER: Q. What representations, if any, did
You
24 feel that the ads were making?
25 A. That the Kent cigarette had a cleaner smoke; they
26 were -- they would filter out anything that was injurious.
27 They had a better smoke and that it was fun to smoke
28 something like that.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1181

1 Q. And did you believe those representations?
2 A. I did.
3 Q. When you would go to parties and social events, were
4 people smoking?
5 A. Yes.
6 Q. And your husband testified that there was a poker
game
7 that he was involved in back in Cleveland?
8 A. Yes.
9 Q. And would those games be at your house?
10 A. Yes, from time to time.
11 Q. And were you a social hostess to those games?
12 A. No, I would lay out what was going to be used and
13 disappear. That was my role.
14 Q. And what would you lay out?
15 A. I believe I would often put cigarettes and M & Ms or
16 nuts, or things like that, drinks.
17 Q. And if you put out cigarettes, what cigarettes would
18 you put out?
19 A. Kents.
20 Q. Was there any other brand of cigarette smoked in
your
21 household while you were living in Cleveland?
22 A. No, not to any degree, unless somebody brought in a
23 pack from -- you know, that had something else that they
24 were smoking, but we didn't smoke anything else.
25 Q. Did you pay any attention to what other people were
26 smoking?
27 A. Not really.
28 Q. If I asked you in 1953 if you knew what brands of
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1182

1 cigarettes were on the market besides Kents, would you be
2 able to tell me?
3 A. I don't have as good a memory for dates and times as
4 my husband does, and I don't always attach time with a
5 specific event or product, so I know about some of the
6 cigarette names, but I couldn't identify when they came on
7 the market or not.
8 Q. Who quit smoking first, you or your husband?

9 A. I did.
10 Q. And why did you quit smoking?
11 A. I realized that there was a connection between my
12 migraine headaches, that I had for many years, and either
13 smoking myself or being in a smoke-filled room, and so I
14 stopped smoking, and that was one reason.
15 The other reason is I felt that I didn't want my
16 children to start smoking, because I was more aware of
some
17 of the problems of smoking, and I felt that the best way
to
18 influence children was by being a model for them and by
19 stopping smoking.
20 Q. And do you know when your husband quit smoking?
21 A. He stopped after we got back from Berkeley. I
wasn't
22 clear about just when he stopped, as far as the date is
23 concerned.
24 Q. You moved to California in 1964?
25 A. Yes.
26 Q. When you moved to California, did either you or your
husband smoke?
27 A. No.
28

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1183
1 Q. The time period that you were in Cleveland, did you
go
2 to your husband's job site?
3 A. I would just go there to pick him up when I had the
4 car for the day and he would go in in a carpool with
5 somebody else, and then I'd do errands and pick him up at
6 the office in the evening to bring him home.
7 Q. Do you have any memory of any construction work going
on there?
8 A. When I got there, it was ended for the day, so I
10 remember the barricades and the construction as it was
going
11 up, but I don't believe I was there when any of the
12 construction was actually being done.
13 Q. And in Los Angeles at the Reiss Davis Center, was
14 there -- did you ever go to your husband's job site there?
15 A. Just a few times. We lived nearby, and so there was
16 not any occasion for me to call for him or to be there,
17 except if there was a particular celebration of some kind.
18 Q. There was some asbestos that you had removed from
your
19 house in Los Angeles?
20 A. Yes. We were away for a week on vacation, and when
we
21 got back, the house was flooded and --
22 Q. What was?
23 A. Flooded.
24 Q. From rains?
25 A. The washing machine, the hose had broken, and it was
26 constantly pouring water that went down the basement and
27 filled the basement and went up to the area where the
tubing
28 was with asbestos, and the layers of asbestos covering the

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1184
1 ducts was loose and lying about, when we were able to get

2 out some of the water, and so there was no alternative, we
3 had to remove the asbestos, because it was in a heap, and
so
4 we -- we had the place rehabilitated and new ducts put in
5 and wrapped with something else.

6 Q. How big a room is this basement?

7 A. It's very small. It's just for the furnace and hot
8 water heater, but it has all the ducts going up to the rest
9 of the house.

10 Q. And was the asbestos around the outside of the ducts
11 or on the inside of the ducts?

12 A. The outside.

13 Q. Was the basement an area that people spent time in
or
14 went to?

15 A. No. It was little cement area with the rest being
16 dirt, actually.

17 Q. When did this happen that this flood occurred?

18 A. It was around '87 or '88. I'm not clear.

19 Q. And then you hired somebody to come out?

20 A. Right.

21 Q. And were you home when they did the work?

22 A. I was home. They wrapped the whole place in plastic
23 and used the approved method at the time of asbestos
24 removal. It looked like something from outer space, and
25 they wore special uniforms and disposed of the asbestos in
a

26 special way so that it was not spread around.

27 Q. And did they report to you whether or not it had all
28 been successfully removed?

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1185

1 A. Yes. They took a reading and they said it was fine.

2 Q. Your husband was not home during that time?

3 A. Not during the day. It actually took, I think, just
4 one day, and he was at the office at that time.

5 Q. Now, your husband was diagnosed with a colon cancer?

6 A. Yes.

7 Q. Did he fully recover from that, as far as you could
8 tell?

9 A. Yes, he had a complete recovery. The surgeon cut the
10 area that had any kind of involvement in cancer, and it
was

11 in a place located so that there was no interference with
12 elimination or having to cut into the skin for any other
13 kind of procedure. So it was very successful.

14 Q. And was he able to resume full-time activities after
15 that?

16 A. Yes.

17 Q. In 1987, I think it was, he had a prostate cancer?

18 A. Yes.

19 Q. And he had surgery for that?

20 A. Yes.

21 Q. And after the surgery for that, was he able to
resume

22 full-time activity?

23 A. Yes.

24 Q. I take it that when he had the surgery and until he
25 recovered, there was some effect on him from that?

26 A. Oh, yes.

27 Q. About how long did it take him to recover?

28 A. He is a man who just doesn't let anything get him

1186

1 down, and I think his being able to resume his normal life
2 as fast as possible has helped him through all of his
3 illnesses, and it was an amazingly short time. I don't
4 think it was more than ten days that he was back at work,
if

5 that, after his surgery for prostate cancer.

6 Q. And you were diagnosed with breast cancer?

7 A. Yes.

8 Q. And did you have surgery as a result of that?

9 A. Yes.

10 Q. What time was this? When did that happen?

11 A. This was a year ago last April.

12 Q. And how soon after that was your husband diagnosed
13 with mesothelioma?

14 A. Well, the following August was the time that they
gave
15 us the diagnosis.

16 Q. Were you fully recovered at that point in time when
he
17 was diagnosed?

18 A. Well, pretty much, pretty much. I didn't have -- I
19 had a mastectomy. I didn't have any radiation or
20 chemotherapy, so the recovery was pretty fast, and I just
21 didn't dwell on it too much. Before the August diagnosis,
22 he had problems physically that I was concerned about and
23 worried about.

24 Q. What kind of problems?

25 A. The problems in catching his breath and feeling that
26 there was something wrong when he would breathe.

27 Q. When did that happen?

28 A. In -- let's see. It was around June that he had the
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1187

1 first time when the fluid was drained from the pleura, and
2 he felt better after that. But from then on, there was --
3 he had -- he was feeling better, and then the fluid
4 returned, and from there on, in it was very worrisome, and
5 he had finally the diagnosis in August.

6 Q. And through the course of his treatment for
7 mesothelioma, have you been involved in that?

8 A. Oh, yes.

9 Q. Do you go to his appointments with him?

10 A. Yeah, it was hard for him to drive, and so I drove
him

11 and stayed there, and it was much worse to see him suffer
12 than any kind of pain that I had had in my cancer.

13 Q. And why was that? What do you mean by that?

14 A. It's much more difficult, I think, to see someone

you
15 love in pain and feeling that you want to do something for
16 them and suffering your own pain and feeling that you can,
17 at least, do something for yourself, but not be able to
stop

18 the pain and sadness about my husband.

19 Q. Now, you were here while your husband was
testifying,

20 and I don't want to go over things that he's already
21 described for the jury, but were there symptoms or side
22 effects that he had as a result of the chemotherapy that

you
23 were able to witness that he didn't talk about?
24 A. Well, my husband is a very proud man, and as part of
25 the results of the chemotherapy, he would occasionally
have
26 liquid leaking from his nose that he wasn't even aware of,
27 and it was humiliating for him to have me hand him a
28 handkerchief or tell him to wipe his nose. And in ways
that

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1188
1 I took on the role of mother, it was something that he
2 fought and I was glad to see him fight, because it meant he
3 had that energy. But it was very troublesome to both of
us.

4 He got over that.

5 Q. Did he take medication after the chemotherapy
session?

6 A. Well, he took therapy to help the nausea, and much of
7 it just kind of made him either terribly sleepy or woozy,
or
8 not really do the job of stopping the nausea, so it was
9 mainly for the nausea that he took the medication.

10 Q. Were there any incidences that occurred as a result
of
11 him taking the antinausea medication?

12 A. He complained to the doctor that the medication that
13 he was given was really not doing very much for his
nausea,
14 so the doctor said, "Well, take them all together," which
he
15 did.

16 And he was downstairs and going upstairs to bed, and
17 the stairs came up and hit him in the nose, and I found
him
18 sprawled out on the stairs. And he had cut his nose and
was
19 just, you know, very dizzy and not able to really function
20 well. I helped him up the stairs and put him to bed, and
he
21 said, "Next time I guess I'll take the medications and go
22 right to bed so I won't fall."

23 Q. Did you have to take him to the emergency room on
any
24 occasions?

25 A. Yes, once I took him and once the paramedics took
him.

26 Among the worst times was when he had fluid, this was
before

27 the chemotherapy had started, and he had fluid in his
lungs
28 or bronchials, and he just couldn't lie down. I could
hear

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1189
1 him sloshing as he turned around in bed, and he couldn't
2 sleep, he was really beside himself on the one hand,
because
3 of the inability to breathe, and also the terrible fear
that
4 the mesothelioma was causing this and taking over.

1 Your answer was: "After."

2 A. Well --

3 Q. That's what you told us just now. And then my next
4 question was --

5 A. Wait a second. I'm sorry.

6 Q. Let me ask you again. Did you quit smoking before or
7 after the Surgeon General's report or after?

8 A. Before.

9 Q. And the question I asked you at the deposition was if
10 the Surgeon General's report come out before or after you
11 quit, and your answer was after.

12 A. Right.

13 Q. And then I asked you: "What about your husband, was
14 it before or after he quit smoking?"?

15 And your answer was: "I think it was before."

16 A. I just don't remember. There was much more talk

about

17 it, and I don't remember whether that talk was -- because

we

18 were in a medical setting, this was knowledge even before
19 the Surgeon General's report was out, and that only
20 confirmed it. And I just don't recall exactly when it was
21 that he stopped smoking.

22 Q. The Foxmans were a couple that you met in Topeka?

23 A. Yes.

24 Q. At some point, Mr. Foxman went in the Army?

25 A. Yes.

26 Q. And then you moved from Topeka to Cleveland?

27 A. Uh-huh.

28 Q. And then at some point, you realized the Foxmans had

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1 moved to Cleveland because you ran into Mrs. Foxman?

2 A. Right.

3 Q. And that happened about six years after you moved to
4 Cleveland?

5 A. No, I initially said it was six years. But in the
6 amended corrections, I said two years. I am not good on
7 dates, and I remembered an event that happened when I saw
8 Anita Foxman with her son, who looked exactly like her
9 husband. She was holding a little Elliott. .

10 And so I, in my memory, I thought that that was the
11 first time that I saw her, but actually, she contacted me
12 earlier than that when they moved to Cleveland, because
she

13 wanted a pediatrician and an obstetrician for herself and
14 wanted to know who I was using. And that was in around
'54.

15 Q. Do you remember page 35, Counsel, line 16, we were
16 talking about the Foxmans at your deposition?

17 A. Uh-huh.

18 Q. And I asked you: "How long, after you had moved to
19 Cleveland, did you run into Mrs. Foxman?" And your answer
20 was: "Let me think now. It was about six years."

21 A. That's what I said, but I've corrected it.

22 Q. Thank you Mrs. Horowitz.

23 A. Okay.

24 CROSS-EXAMINATION BY MR. BRAKE

25 MR. BRAKE: Q. Just one thing which, I'll ask from
26 over here.

27 Mrs. Horowitz, I just wanted to make one thing

clear.

28 You're not able to tell us when it was that your husband
JOANNE M. FARRELL, C.S.R. (415) 479-0132

1193

1 stopped smoking Chesterfields and started smoking Kents;
2 right?

3 A. I know that we smoked Chesterfields in Topeka and we
4 smoked Kents in Cleveland, and beyond that, I don't recall
5 the exact dates or specifics.

6 Q. You don't recall the specifics of when your husband
7 started smoking Kents?

8 A. Right.

9 Q. Thank you.

10 REDIRECT EXAMINATION BY MS. CHABER

11 MS. CHABER: Q. Mrs. Horowitz, have you talked to
12 Mrs. Foxman about when you actually met each other again
--

13 A. Yes.

14 Q. -- in Cleveland?

15 A. Yes.

16 Q. And is that why you changed the answer that you'd
17 given in the deposition?

18 A. Yes.

19 MR. OHLEMAYER: Objection, Your Honor. It can only
20 call for hearsay.

21 THE COURT: I think she can explain why she changed
22 it.

23 MS. CHABER: Q. And Mrs. Horowitz, do you have a
24 particular reputation in your family with respect to
dates?

25 A. Not only dates, but numbers of any kind. I'm not
very

26 good at it.

27 Q. Is that what your reputation is?

28 A. Yes.

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1194

1 MS. CHABER: I don't have anything further.

2 MR. OHLEMAYER: Nothing, Your Honor.

3 THE COURT: Any member of the jury have a question?

4 Apparently not, Mrs. Horowitz. Thank you very much. You
5 may be excused.

6 We will take the evening recess at this time, ladies
7 and gentlemen. Please keep in mind the admonition given to
8 you before that you're not to form an opinion about the
9 case, you are not to do any research on it or look anything
10 up anywhere or talk to anybody about it. If anyone
attempts

11 to discuss the case with you in any way, please advise the
12 Court of that fact. Return tomorrow morning at 9:00
o'clock

13 please. See you then.

14 (In open court outside the presence of the jury.)

15 THE COURT: I have a note from the jury. They want
to

16 know how Mrs. Horowitz can be testifying if she was in the
17 courtroom. Is that because she's a plaintiff, also.

18 MS. CHABER: Your Honor, could I ask a question on
19 both this and the last question. The other question that
20 was asked that the Court reported to us in chambers dealt
21 with why the lawsuit being filed here. I never heard --

22 THE COURT: I haven't told them. I haven't said
23 anything.
24 MS. CHABER: I understand that the Court is going to
25 say something in response to both of them?
26 THE COURT: Yes, I'll answer both of them.
27 MS. CHABER: The thing --
28 THE COURT: We didn't exclude witnesses, I don't
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1195
1 believe, anyway. There was no such order.
2 MR. OHLEMAYER: They are parties.
3 THE COURT: I know, but I don't think there's been an
4 exclusionary order requested or made.
5 MR. OHLEMAYER: There aren't any fact witnesses.
6 MS. CHABER: There was when another defendant was
7 here, and I've been following that with respect to other
8 witnesses.
9 THE COURT: You had something else?
10 MS. CHABER: Yes, I had another matter that I wanted
11 to raise.
12 As the Court's aware, there is another or there has
13 been another case being tried in this courthouse regarding
14 these same defendants. Counsel from that case have been
in
15 and out of this courtroom earlier on. Mr. Brake
introduced
16 Mr. McElaney to the jury. He was --
17 MR. BRAKE: In the opening statement, is that what
18 you're talking about?
19 MS. CHABER: Yes, introduced them. In other words,
20 those people have been around. I am very concerned that
21 this jury not be tainted by any publicity with respect to
22 that case, and I would ask this Court to issue a gag order
23 on the lawyers for Lorillard and Hollingsworth and Vose to
24 not deal with the press on that case until the conclusion
of
25 this case. Its the same lawyers who are involved here,
Your
26 Honor.
27 MR. OHLEMAYER: The jury, Your Honor --
28 MS. CHABER: And I'm sure they would be asking for
the
 JOANNE M. FARRELL, C.S.R. (415) 479-0132

1196
1 same thing with respect if there had been a plaintiffs'
2 verdict. Apparently, the jury found that there was a
3 defect, but found that it wasn't a cause of injury.
4 MR. OHLEMAYER: Your Honor, I'm not -- I'm not going
5 to walk out tonight and step in front of two microphones
and
6 have a press conference. I've got partners who are in
7 Kansas City, I've got partners in California. I don't know
8 who's going to say what to whom, or who may get asked about
9 that.
10 We typically do not say much about anything in the
11 press. I'd rather try a case in the courtroom. I don't
12 think we need a gag order, I think the jury gets
admonished
13 to not read about this or other cases. All I'm saying is
14 don't want to be in violation of something that I have no
15 control over from San Francisco.

16 MS. CHABER: They do have control.
17 THE COURT: All she's saying is that you not say
18 anything, and you're telling me you won't.
19 MS. CHABER: No, I'm not saying just them
personally.
20 THE COURT: I can't gag somebody else.
21 MS. CHABER: It's the same law firms, the same
lawyers
22 that are involved in this.
23 THE COURT: They are not before me and I can't do
24 anything about it.
25 MS. CHABER: They are going to be. I was told that
26 they were joining this case and they are going to be
coming
27 in here. And if Mr. McElaney is quoted in the paper
saying,
28 you know, see, this stuff couldn't possibly cause
anybody's

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1197
1 injury, that is going to taint and could potentially taint
2 this jury.
3 And it's the kind of thing I would have to come in
4 here potentially and ask for a mistrial, and I could
5 guarantee this court even though that's another plaintiffs'
6 law firm that's not even related to mine, that they'd be
7 asking for the same thing if it was a plaintiffs' verdict.
8 THE COURT: Well, I'll just admonish them not to
talk,
9 and don't let any of your employees. And I would tell your
10 cohorts in your firm that we've issued it. I'm sure that
11 you don't want this a mistrial to result here.
12 MR. OHLEMEYER: And I appreciate that. If you make
an
13 order, I can't -- how can I enforce it? Somebody may have
14 already said something.
15 THE COURT: I understand that. All I'm saying is
you
16 not do it.
17 MR. OHLEMEYER: I won't.
18 THE COURT: And you tell your colleagues or
associates
19 that that order has been made here, and we would
appreciate
20 it if they didn't do anything that will mar or interfere
21 with the deliberation in this case.
22 MR. OHLEMEYER: That's fine. But what I don't want
to
23 have happen is two days from now, counsel come in here and
say somebody said something to somebody that violated your
24 orders and entitles her to a mistrial. I don't want to
25
26 set --
27 THE COURT: You've heard what I've said, and all I'm
28 asking for is a gag reasonably and sensibly to protect
this

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1198
1 case to the best of your ability, and you can do a lot of
2 things or not do a lot of things. Don't do them. Protect
3 it. Let's get this trial over with for the benefit of not
4 only you, but all the parties, the witnesses involved.

5 Nobody wants to come back and try it over.
6 MR. BRAKE: These cases don't get the press
attention.
7 THE COURT: Of course they don't. Something could
8 happen.
9 MR. BRAKE: We will.
10 THE COURT: I'm not going to admonish the jury not
to
11 read the papers about it because they will start searching
12 for something.
13 MS. CHABER: Exactly. That will highlight it.
14 THE COURT: I've told you about the case that it
happened that I was with and I think they searched and
they
16 found something.
17 MR. BRAKE: I had one thing, Your Honor, and we can
18 take it up in the morning, which relates to Mr. Foxman and
19 the questions that were asked about was he sick.
20 The jury heard three things. He used to go to poker
21 games, he used to get smoke Kents, and now he might be too
22 sick to come to San Francisco to testify, and then the
23 objection was sustained.
24 I think what I would request is a short instruction
to
25 the effect that there were questions about Mr. Foxman,
that
26 there's an issue for you to decide relating to whether
he's
27 well enough to travel to San Francisco, and I think the
jury
28 should know that his particular problem, which I
understand

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1199
1 is not in dispute, he has some heart conditions that may
2 prevent him coming here, and it's your issue. I think a
3 jury could infer that Mr. Foxman, having gone to some poker
4 games and smoking some Kents, can't come to San Francisco.
5 I'm not sure that's the purpose.
6 MS. CHABER: I would have gone on and I would have
7 said what: Problem does he have, and you objeced. He has
8 congestive heart failure and he passed out on the street in
9 Portland.
10 MR. BRAKE: Whether he's well enough to travel isn't
a
11 question for the jury.
12 MS. CHABER: The jury has asked questions about why
13 aren't witnesses here. He is in the state of California
and
14 I did not want the jury speculating again as to why
15 witnesses aren't here.
16 MR. BRAKE: I don't want to draw a lot of attention
to
17 it, but it was kind of a funny exchange and I'd like to
18 clear it up.
19 (Whereupon, court was in recess.)
20
21
22
23
24
25

26
27
28

JOANNE M. FARRELL, C.S.R. (415) 479-0132

1200

1 REPORTER'S CERTIFICATE
2

3 I, JOANNE M. FARRELL, A Pro Tempore Court Reporter
4 of the Superior Court of the City and County of San
5 Francisco, State of California, do hereby certify that I
6 correctly reported the within-entitled matter and that the
7 foregoing is a full, true and correct transcription of my
8 shorthand notes of the testimony and other oral proceedings
9 had in the said matter.

10 Dated this 17th day of August 1995
11 San Francisco, California

12 _____
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
JOANNE M. FARRELL, CSR# 4838